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Supreme Court, U.S.
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No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ELIZABETH A. TILSON,

Petitioner,

v.

CITY OF WICHITA, KANSAS
MUNICIPAL CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KANSAS

PETITION FOR A WRIT OF CERTIORARI

*STEVEN W. GRABER
3818 E. Stroud Road
Hutchinson, Kansas 67501
(316) 665-0077

PETER C. BATAILLON
7000 Spring Street
Ohama, Nebraska 68106
(402) 397-6200

Attorneys for Petitioner

**Counsel of Record*

Balmar Legal Publishing Services, Washington, D.C. (202) 682-9800

QUESTIONS PRESENTED

Roe v Wade established the abortion right under the U.S. Constitution. The *Roe* decision, specifically declined to determine when human life begins, deeming it unnecessary to do so. Modern medical science, embracing the concepts of viability, reproductive choice, termination of a pregnancy, potential life and personhood brings into question the jurisprudential void created in *Roe*. The questions presented are

1. Whether, in light of modern medical science the factual foundations of *Roe* are sufficiently changed so as to require a reanalysis of the abortion right; specifically, whether the Court must reconsider whether or not it is now necessary to determine when human life begins.
2. Whether it is still correct analysis, under the *Roe* abortion right, to consider the reproductive right and liberty right as superior to the life issue.
3. Whether since viability, as now determined by medical science exists from conception, the viability standard must be established at conception.
4. Whether the Kansas Supreme Court erred in holding petitioner's medical scientific evidence irrelevant.

PARTIES

All parties to the proceeding are listed in the caption.

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Elizabeth Ann Tilson, respectfully prays that a petition for a writ of certiorari issue to review the judgment and opinion of the Kansas Supreme Court, entered on June 28, 1993.

OPINIONS BELOW

The opinion of the Kansas Supreme Court (set forth at pages A-1 to A-17 of the Appendix to this Petition) is reported at 253 Kan. 285, __P. 2d.__ (1993). The district court opinion is unreported but is set forth at pages D-1 to D-23 of the Appendix.

JURISDICTION

The June 28, 1993 Opinion of the Kansas Supreme Court ruled as a matter of U.S. Constitutional law, abortion is a legal

act and therefore cannot be a harm to be prevented by the common law doctrine of justification.

This Court has jurisdiction pursuant to 28 U.S.C. 1257, as further detailed by Rule 10.1(c) of Rules of the Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Roe v Wade, 410 U.S. 113, *93* S. Ct. 705 (1973 Fourteenth Amendment to the Constitution of the United States , Section 1.

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1.

The *Roe* Court expressly and purposely did not address the issue of when human life begins.[1]

On August 3, 1991, the petitioner, Elizabeth A. Tilson, was arrested for trespassing at the Wichita Family Planning Clinic located at 3013 East Central in Wichita, Kansas. Petitioner's sole purpose for being in the property was to rescue unborn human beings from being harmed and to rescue the mothers, fathers, grandparents and siblings from the harms resulting from induced abortion.

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[1] Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. *We need not resolve the difficult question of when life begins. Roe v. wade*, 410 U.S. 113, 159 (1973).

Petitioner takes great care to distinguish her rescue activities as being vastly different than "protest" against abortion. Her express intent at all times was to "rescue" the lives of human babies and their families from the traumatic and detrimental affects of abortion. (G-2) Her efforts were successful. One young girl scheduled for an abortion on August 3, 1991 did, after seeing the ongoing rescue, change her mind and give birth to her baby. (G-4,5)

THIS LAW SUIT

On November 13, 1991, petitioner was found guilty of criminal trespass in Wichita Municipal Court and appealed her conviction to the Sedgwick County District Court. (D-1)

A pretrial conference requested by Petitioner was held on January 14, 1992. Petitioner requested the Trial Court to resolve the unanswered question of when human life begins, and determine when that life is legally cognizable. The resolution of these two questions was a condition precedent to Petitioner's offering the common law justification defense. (F-1) On January 21, 1992, the court agreed to hear the evidence. (E-1)

At trial, petitioner claimed her non-violent, non-damaging rescue was justified because "abortion takes the life of an unborn baby I wanted to prevent the detrimental effect that happens to the woman, the father of the baby, the grandparents and brothers and sisters" when an abortion is performed. (G-2)

THE DISTRICT COURT'S OPINION

On July 20, 1992, the Trial Court found petitioner's evidence relevant and admissable and ruled that human life begins at conception and continues on for an average life span unless interrupted by trauma or disease. (D-21) Further, the Trial Court said petitioner was justified in trespassing because she went on the property for the purpose of saving a human life. The Trial Court found that abortion takes a human life. (D-21)

The Trial Court held that what petitioner believed intuitively and from her years of independent study of the issues, was not only reasonable but substantiated by the international scientific community: that is, life for the human baby begins at conception and such baby is viable from that point on. (D-21)

THE KANSAS SUPREME COURT'S OPINION

The City of Wichita filed a timely appeal to the Kansas Supreme Court. After analyzing many of the cases on the issue the Kansas Court on June 28, 1993, opined that the necessity defense was not applicable to rescue cases *because the abortion right is a constitutionally protected right and therefore cannot be a legal harm which if prevented would justify a non-violent, non-damaging*, simple trespass on to personal property. (emphasis supplied throughout unless otherwise indicated)(A-11, 16) The Kansas Supreme Court decided the issue in direct response to Mrs. Tilson's pretrial conference request that the evidence as to when life begins be admitted and a determination be made as to when human life has legal cognizance. In arriving at its conclusion the Kansas Supreme Court said, "When the objective sought is to prevent by criminal activity a lawful, constitutional right, the defense of necessity is inapplicable, and evidence of when life begins is irrelevant and should not have been admitted." (A-16)

Petitioner's purpose was to rescue life and save the mother and others from harm.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD RESOLVE THE ISSUE OF WHEN LIFE BEGINS.

First, in *Roe's* language is established one of the greatest vacuums ever formulated in jurisprudence. It has not gone unnoticed.

This vacuum has been the subject of critical comments by foreign courts. In elevating "liberty" above humanity or "life", one court said the Court had diminished life which is the,"... compelling basis of the dignity of man and... the pre-condition for all basic constitutional rights."[2]

Scholars, take exception to the "life vacuum".

> "As time passes, not only does the *Roe* decision appear to be collapsing from within, but the opinions of leading constitutional law writers, many of them not opposed to abortion in principle, have been marshaled against it. Archibald Cox, Alexander Bickel, John Hart Ely, Harry Wellington, Richard Epstein and Paul Freund have all been highly critical." Mary Ann Glendon, *Abortion and Divorce in Western Law* 44 (1987).

The Court itself has had no little disunity on the matter.

> The judiciary is otherwise left to the embarrassing and defensive position of justifying its misadventures under increasingly indiscriminate standards. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 814 (O'Connor, J., dissenting): "No legal rule or doctrine is safe from ad hoc nullification by this court when an occasion for its application arises in a case involving the regulation of abortion....[T]he Court strains to discover 'the anti-abortion character of the statute'...and invents an unprecedented canon of construction under which 'in cases involving abortion, a permissible reading of the statute is to be avoided at all costs.'" Unfortunately, the plight of the lower courts since the landmark

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[2] Decision of the Federal Constitutional Court of the Federal Republic of Germany, translated in Jonas & Gorby, *West German Abortion Decision: A Contrast to Roe v. Wade, With Commentaries*, 9 J. Mar. J. Prac. & Proc. 551, (1976)

> decision of *Roe v. Wade* has been repeatedly to defend it. After nineteen years, and even more revisits to the subject by the Court, the people remain confused and ihcreasingly polarized. But with each new decision, it becomes increasingly obvious that any "limits" *Roe* purports to impose on abortion are, in reality, shallow rhetoric for "abortion on demand," *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U. S. 747, 782-784 (1986) (Burger, C. J., dissenting). Even more obvious is the fact that *Roe* is "clearly on a collision course with itself," *City of Akron v. Akron Center for Reproductive Health*, 462 U. S. 416, 458 (1983) (O'Connor, J. dissenting)

It was not only the petitioner who was vindicated by the evidence at trial below.

> "...the termination of a pregnancy typically involves the destruction of another entity: the fetus...the fetus is an entity that bears in its cells all the genetic information that characterizes a member of the species *homo sapiens* and distinguishes an individual member of that species from all others, and second, that there is no nonarbitrary line separating a fetus from a child or, indeed, an adult human being. Given that the continued existence and development-that is to say, the life-of such an entity are so directly at stake in the woman's decision whether or not to terminate her pregnancy, that decision must be recognized as *sui generis*, different...
>
> Aware that in *Roe* it essentially created something out of nothing and that there are many in this country who hold that decision to be basically illegitimate, the Court responds defensively...I do not share the warped point of view of the majority, nor can I follow

> the tortuous path the majority treads in proceeding to strike down the statute before us. I dissent." (White J. Dissenting) *Thornburgh v American College of Obstetrics*, 106 S.Ct. 2169 (1986).

The jurisprudential vacuum created by the *Roe* Court in not dealing with the issue of when life begins has the irreconcilable affect of denying both the personhood and humanity of the unborn child. This vacuum was grounded on the proposition that medical science could not provide an answer to the question of when life begins. *Roe*, p.159. The answer is now available and is provided in petitioner's medical scientific evidence. We emphasize, the *Roe* Court based its abortion ruling on the issue of personhood and did not alter the principle of the common law that the destruction of property may be justified in order to save human life and health. It is this vacuum that has polarized and divided our body politic.[3]

The Court has indicated its willingness to fill in the vast vacuum when the time should be right. The *Roe* Court, the Court since, and the many lower courts across the land have deferred to science and medicine to come to grips with the issues of abortion.

Second, it is clear that the Court invites even solicits the very medical scientific evidence petitioner produced at trial. The Court has realized and come to depend on the growth of medical technology to supply answers to the issues of abortion

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[3] In all fairness, the *Roe* Court did not have a record to consider. *Roe* was an injunctive action tried on a declaratory basis and no trial record was made. No scientific evidence was taken at trial and thus none was available on appeal. The Court was wise to leave the door open to modern medical scientific enlightenment. Indeed, the Court has altered its *Roe* framework in the light of the advance of medical science. *Casey*, p. 2818.

so that the doctrines of abortion will grow along a "rational continuum" of medical fact.[4]

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[4] *Doe v. Bolton*, 410 U.S. 179, 93 S.Ct. 739 (1973). p. 190-1 "A state is not to be reproached, however, for a past judgmental *determination made in the light if then-existing medical knowledge*...That argument denies the State the right to *readjust its views* and emphasis in the light of the advanced knowledge and techniques of the day."

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 96 S.Ct. 2831 (1979).p. 63-4 "As noted above, we recognized in Roe that *viability was a matter of medical judgment*, skill, and technical ability, and we preserved the flexibility of the term. Section 2(2) does the same....In any event, we agree with the District Court that *it is not the proper function of the legislature or the courts to place viability, which is a medical concept,at a specific point in the gestation period.*"

Akron v. Akron Center for Reproductive Health Services, 462, U.S. 416, 103 S.Ct. 2481 (1983). p. 430 Footnote 11 "We note that the medical evidence suggests that until..."

p.454 Footnote 1 "Based on the Court's review of the contemporary medical literature..."

p. 454 "As the Court indicates today, the Stat's compelling interest in maternal changes as medical technology changes..."

p. 456 "...the State must continuously and conscientiously study medical and scientific literature..."

Webster v. Reproductive Health Services,

492 U.S. 490, 109 S.Ct. 3040 (1989).

...*Colautti* that 'neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability—be it weeks of gestation or fetal weight or any other single factor—as the determinant of when the State has a compelling interest in the life or health of the fetus.' 439 U.S. at 388-89, 99 S.Ct. at 682.

Planned Parenthood of Southeastern Pennsylvania v. Casey 112 S.Ct. 2791 (1992).p. 2858 "In *Colautti v. Franklin*, 439 U.S. 379, 99 S.Ct. 675, 58 L.Ed. 2d 596 (1979), ...In the process, we made clear that the trimester framework incorporated only one definition of viability—ours—as we forbade States from deciding that a certain objective indicator—'be it weeks of gestation or fetal weight or any other single factor'—should govern the definition of viability."

It is the unrebutted testimony of petitioner's experts that:

A. IN MEDICAL SCIENCE THERE IS NO DOUBT THAT HUMAN LIFE BEGINS AT CONCEPTION.

"... a new life starts at the moment all of the information necessary and sufficient to distinguish every personality of the new person is gathered inside the same... zona pellucida... (I-5)

"... life has been seen to begin under a microscope at the moment that the whole information was gathered and this whole information was there at the moment of conception which is demonstrated in our species by penetration of the sperm." (I-7)

At conception and the exchange of the D.N.A. information the baby is a human being." (I-8)

"You can see this particular sperm penetrate... into the cytoplasm of the ovum and at that point, the union of the genetic material from the father, which is represented by the sperm, and the genetic material which is in the ovum, a new human life is created." (J-14)

"The [process] is known as either fertilization or conception and it is, biologically speaking, the point where human life begins individual human life begins." (J-15)

"... based upon the principles of scientific investigation and there is absolutely no question that human life begins at the moment when those two, the sperm and the egg join in the process called human conception." (J-34)

"There is a spark or ignition of that life that begins at only one point and that is the point of conception. There is no other point where it begins." (J-39)

B. THE JUST CONCEIVED HUMAN BABY IS COMPLETE AND NOTHING IS ADDED TO HIM OR HER EXCEPT NUTRIENTS AND A NURTURING ENVIRONMENT, JUST AS FOR ADULTS.

The baby, in utero, is compared to a tiny astronaut in a space capsule. The mother and her body provide a nurturing environment and nutrients for the tiny human being until it can survive outside the womb. However, the human being is distinct and separate from the mother who is giving the nurturing environment and the nutrients. (I-13)

C. THE JUST CONCEIVED BABY IS NOT A MERE APPENDAGE, PART OR EXTENSION OF HIS OR HER MOTHER.

> "They are proving that [the baby] does not belong to a given body, [the baby] belongs to herself." (I-16)

We can clearly demonstrate the early human being is not a part of the body of the mother but a different body, a somebody, a body of a new human being different from any already existing.

> "... the growth and development of the baby itself is under the direct control of the child. (J-17)

D. THE BABY IS UNIQUE BOTH WITH REFERENCE SPECIFICALLY TO THE PARENTS AND UNIVERSALLY TO ALL OTHER HUMAN BEINGS.

> "Molecularly speaking... it was discovered about four or five years ago... with a special probe... recognize part of the genetic makeup of a person. Technology is complicated, but the result is very obvious; it looks very much like the bar code that we have in a supermarket. That is difference bands of different widths

are differently spaced and this bar code is specific for its human being." (I-20)

"The code... technology, it is able to recognize that specific bar code in one cell taken from an early embryo of eight cells... that without exception... if the father is not the biological father, we can detect it... " (I-20)

E. THE BABY IS IRREPLACEABLE. THAT IS, THE BABY WILL NEVER BE DUPLICATED IN ITS MAKEUP. ITS CHARACTERISTICS HAVE NEVER BEFORE EXISTED AND ITS GIFTS, ABILITIES, AND COMPOSITION WILL NEVER AGAIN BE REPEATED.

"[The baby] "cannot even be duplicated... it is, itself, a new life and a new individual." (I-6)

"And those [finger] prints [discernable at 2 months] will not change for 80 or 90 years..." (I-16)

"Every human being is unique and irreplaceable". (I-20)

"... no other human being now living would have exactly the same bar code." (I-21)

"... each individual is irreplaceable, it's because this particular individual which has been conceived is some person... that no other one will later exactly reproduce what he was... on any... conception everyone is irreplaceable." (I-22)

"When the sperm enters the ovum... the nuclear material from the father joins that of the mother and a new human being with... 46 chromosomes is created... those chromosomes will be the same for... that individual's life and they are a unique fingerprint,

almost of that individual's existence.(J-15) This human being is the only one of its kind ever." (J-16)

F. THE BABY IS ON A CONTINUUM OF DEVELOPMENT OR MATURATION FROM THE MOMENT OF CONCEPTION TO APPROXIMATELY AGE 20 TO 22.

Interruption of the fertilization process is not interruption of a pregnancy but interruption of a life. (I-11)

The maturing process or developmental process for a human being continues from conception through ages 20-22 years.

"Individual human life is a continuum. It starts at conception and ends at death. Death, of course, can be at any point along the line for a whole variety of different kinds or reasons." (J-37)

G. THE BABY IS VIABLE FROM CONCEPTION THROUGH AN AVERAGE LIFE SPAN UNLESS TRAUMA OR DISEASE INTERRUPTS THE BABY'S LIFE.

Viability means the capability of living. The human being at conception is capable of living. The ability of the baby to live outside a womb is referred to as extracorpal viability. (J-35)

Experiments on babies in utero as early as 11/9 weeks have shown babies will move back from an amniocentesis needle. They feel it. They are able to hear at 11/9 weeks. In one experiment, a baby was touched with a needle several times, then a buzzer was sounded prior to touching the child with a needle. Later all the experimenter had to do was sound the buzzer and the baby would jump. (L-17-18)

H. ABORTION IS INDUCED TRAUMA TO THE POINT OF DEATH OF THE BABY.

"...there are no abortions performed where it is not the intent to kill a human being either in utero or out of the utero" (J-36)

The effect of abortion on the child inside the mother's womb is to kill the child.

I. THE BABY CAN BE TRANSFERRED FROM THE MOTHER'S WOMB TO ANOTHER WOMB.

"...can be transferred to the womb of any woman who's at the right time, inside her so that the transfer of an embryo from in virtro fertilization... a foster mother has been made." (I-13,14)

The human being inside its womb can be transplanted without difficulty. (I-13)

The baby can be conceived by normal intercourse then the tubes washed out and the tiny baby injected in the womb or another mother, or would-be-mother, who is not the biological mother but the uterine mother of this mother and this baby will survive. (I-15)

J. THE BABY IS AN INDEPENDENT INDIVIDUAL.

The demonstration that a child can live outside the womb of the mother is proof that its own life is totally different than the life of the mother. (I-12, 13)

"This new life can live at least up to the third month in-utero, up to the time the baby is sucking her thumb, without communication with the blood of the mother inside the placenta. (I-15)

K. THE BABY DOES NOT NEED A WOMB IN WHICH TO GROW AND DEVELOP.

"It is even possible that a child can survive outside the womb. It can attach itself to the abdomen and grow itself. What is absolutely necessary is a shelter and nurture and nutrients." (I-12)

L. THE JUST CONCEIVED BABY IS COMPLETELY HUMAN AND CAN BE NOTHING ELSE.

The baby in the womb is not a thing but a human being. It by its own venture grows and defines itself.

This human being is so small it would fit in your fist but you could distinguish the head the arms the legs be able to determine the sex of the child and with a magnifying glass, could see the palm prints. With a good microscope the fingerprints and the beginnings of the eye lens can be seen. A fortune teller could predict the future by the clarity of the palm prints. A policeman could take identity from the fingerprints. (I-16)

M. ABORTION HAS SERIOUS DETRIMENTAL AFFECTS TO MOTHERS, FATHERS, SIBLINGS, AND OTHER FAMILY MEMBERS.

During his clinical experience, hundreds of women presented with one problem or another that related back to an induced abortion. These problems were not found only in the mothers but also in men who had participated in abortion by either objecting to the abortion which objection was not adhered to by the mother or coerced or encouraged a woman into getting an abortion. (K-4)

He has consulted with Dr. C. Everett Koop, regarding the report to the American people on the psychological health risk of induced abortions. Because of politics the report did not get published. Instead a letter was submitted to president Reagan on January 9, 1989. It called for a one hundred million dollar perspective study on the prolonged affects of induced abortion.

There has never been a large scale study although this is the most common surgical procedure in America with approximately 26 million procedures done to date.

The bottom line is that abortion cannot be concluded to be psychologically safe. (K-6,7,8)

In talking of the harms of abortion, we are talking about the psychological after effect. The harm is manifold. (K-11)

An abortion counselor is often biased and has a conflict of interest. (K-16,17,18) There is an informational deficit Dr. Rue concludes:

> "And, therefore, they [the patients] are at risk of psychological traumatization." (K-19)

Men are also victims and suffer in the abortion process. Some men suffer grievously. Dr. Rue has treated women whose boyfriends committed suicide after being tortured for several years with fetal nightmares and flashbacks about an unborn child demanding his father rescue him from abortion. These individuals decompensated and ultimately took their own life." (K-23,24)

A woman who is in adolescence and elects abortion then affects parents and surviving grandparents. They, too, if they coerced the abortion or felt in some way responsible have guilt feelings and depression. Subsequent children of mothers who have elected to abort one of their siblings and often the children will have great fear and distrust of the parent feeling that the parent is murderous or dangerous. They have a sense of dread that at some point when they do something wrong, they too will be eliminated from the family picture. (K-24)

> "[Abortion] impacts every relationship that the woman has of significance in her life" (K-25)

N. TRAUMA FROM ABORTION FOR MOST IS GREATER THAN ANXIETY FROM LIVE BIRTH OR ADOPTION.

The largest study ever done in the world, the study in Denmark, in 1981, Dr. Henry David found... women who made their decisions in secrecy had *four times higher rate of admission to psychiatric hospitals* if they elected abortion than if they elected delivery. It is clear that the individual runs a higher risk of psychological harm and traumatization from induced abortion than from other delivery options such as live birth or adoption. (K-34,35)

O. THE RECENT ADVANCES IN MEDICAL SCIENCE LEAVE NO DOUBT OF THE ABOVE FACTS A-O:

> "We knew *since now around three years*, scientists have made a discovery in this country and England, (in this country by Holiday and Swain and in England made by Surani) that conception is more complicated than we were believing and teaching it five years ago." (I-9, 10)

> "If only the amount of information coming from the father was present, everything underlined on the male way, there would be no human being. There would be life and the same would divide; it would make vesicles and finally some flesh looking placenta. Nothing itself, no human." (I-9)

Conversely, if there was not true conception at the beginning, a true fertilization, but there were only chromosomes from the mother's side for example in a virgin who has had some sudden growth of one of the oviums or ovary and it makes what we call a dermoid cyst inside the ovary. It grows; it's life and this life is human, but no baby. (I-10)

> "What is peculiar, inside that tumor, you can find teeth, skin, hairs, some nerves. That is, so to speak, spare parts, but no baby. Nobody is there; only a bunch of spare parts." (I-10)

> "There is in the very near future another possibility of transplanting, *this is a new discovery just a few months old.* (I-14)

> "That means the autonomy of the... early life is much bigger than we were believing... and I would honestly recognize that *one year ago* I would not have spoken those words because I did not know it. (I-16)

I'm not saying that a human, the tiny one which grows inside a womb is a human because I feel that, but because I know it. *Maybe 15 years ago there could be doubt* by some people in some places *but now with what we know* about the information of matter, about the specificity of mankind compared to its closest cousin which is the chimpanzee we are obligated to say, to recognize after fertilization, *after conception that this tiny being, is already a human being, it's not a fertilization or an opinion, it's not a metaphysical contention. It's a fact of plain experimental evidentiary truth.* (I-19)

With this technology it is now possible to record and photograph the live real time reproductive developmental process on film from prior to conception through live birth. These processes have been recorded on video tape. (J-7)

There is work going on already with chemical fluids which would allow for the embryo or fetus to live [outside the womb] throughout the entire process of development. (J-37)

II. PETITIONER'S EVIDENCE IS NOT ONLY RELEVANT BUT EMBRACES THE GREAT ISSUES OF ABORTION.

Petitioner's evidence intimately embraces and impacts the great issues of abortion as espoused in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, ___ U.S. ___, 112 S. Ct. 2791 (1992).

A. THE ASSUMPTIONS OF CHOICE AND VIABILITY.

...*Roe's* essential holding, the holding we affirm, has three parts. First...the right of the woman to choose to have and abortion before viability and to obtain it without undue interference from the State.

Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger a woman's life or health. And third is the principle that the State has legitimate interests from the outset of pregnancy in protecting the health of the woman and the life of the fetus that may become a child. *Casey*, p. 2804.

About the right to choose, the Court said further, "The woman retains ultimate control over her destiny and *her body*...." *Casey*, p. 2816.[5]

No one denies that it is the woman who is pregnant. But the assumption that abortion merely changes the woman's condition from being pregnant to not being pregnant is clearly contradicted by petitioner's evidence.[6] Moreover, the assumption that abortion is only exercising control over mother's body would seem in error. Because life begins at conception and is a

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[5] "The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*." *Casey*, p. 2817.

[6] It is the unequivocal evidence of Dr. Lejeune that abortion is not merely terminating a pregnancy but rather the terminating the life of a human being. (I-11)

unique separate, complete human individual, the woman is not exercising control over her body but is exercising the decision of life and death over another human being. There are consequences to her body but that does not make the baby in her womb a part of her body.

Petitioner's evidence is clear the baby human being is not merely the "product of conception" or a cellular mass tissue appendage of the mother such as the vermiform appendix or tonsils.

Casey talks in terms of reproductive choice. (Casey, p. 2807) Petitioner's evidence is otherwise. There is no "reproductive choice" to make once there is conception. The woman has already reproduced. The baby is leaving the womb. The only choice is the condition in which the baby will leave the womb. Will the baby leave in the natural course of events or will it leave under preemptive conditions which can include trauma induced death. According to Dr. McMillian every abortion process is a process of interruptive trauma which is fatal to the child. (L-17)

B. WHEN LIFE BEGINS IS NOT A MATTER OF PERSONAL BELIEF.

> At the heart of the [14th Amendment] liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the *mystery of human life*. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the State....
>
> [Abortion] is an act fraught with consequences for the woman, for the performers of the procedure, (which some deem nothing short of an act of violence against innocent human life) for the spouse, family and society...and, *depending on one's beliefs*, for the life or potential life that is aborted. *Casey*, p. 2807.

The assumption here is that the beginning of human life is a mystery not known and not knowable. Therefore it is relegated to the sphere of mystery and personal belief. One can believe what one cannot prove. Petitioner's evidence proves that this assumption is no longer valid. It gives us a front row seat in the "House of Origins" and we now not only see the full production of *Homo Sapiens In Utero*, but we 'see' the prelude, in living color. There is no mystery. It is not "potential life", it is life; human life, from conception. It is not up to us to believe or not believe. (I-19)

Dr. Hilger's endoscope shows us not only the living viable sperm uniting with the egg but goes even further back in the process and we see with the naked eye the entire event from ovulation through live birth. We do not deny the existence of heavenly bodies because we can not see them with the naked eye when the technology of telescopes and interspacal travel by satellites tell us they exist.

C. VIABILITY CAN NO LONGER BE RESTRICTED TO ROE AND CASEY'S NARROW DEFINITION.

It is this concept of viability that is most impacted by Petitioner's evidence. The *Casey* Court says:

> Advances in neonatal care have advanced viability to an earlier point. But these facts go only to the scheme of time limits on the realization of competing interests...[but] have no bearing on the validity of *Roe's* central holding, that *viability marks the earliest point at which the state's interest in fetal life is constitutional adequate to justify a ban...on abortion.*
>
> The soundness or unsoundness of that constitutional judgment in no sense turns on whether viability occurs at 28...or 23 to 24 weeks...or at some moment even ...earlier in pregnancy.... *whenever it may occur, the*

> *attainment of viability may continue to serve as the critical fact,* just as it has done since *Roe* was decided....2811-2812. (emphasis supplied).
>
> Consistent with other constitutional norms, legislatures may draw lines which appear arbitrary without the necessity of offering a justification. But courts may not. *We must justify the lines we draw.* And there is no line other than viability which is more workable. To be sure, as we have said, there may be some medical developments that affect the precise point on viability,...but this is an *imprecision* within tolerable limits given that the medical community and all those who must apply its discoveries will continue to explore the matter. *Casey*, p. 2817.

Petitioner's evidence is directly on point. There is no longer any "*imprecision*". What once may have seemed arbitrary and elusive is now a scientific fact pinpointed at the time of conception. (I-7)

Obviously, the Court does not assume there will never be a change in this fact. The viability doctrine can still stand and, "viability may continue to serve as the critical fact...." but it is now neither "imprecise" nor equivocal. Viability is a reality at conception. (J-35)

We must now ask, what has viability as defined as 'the ability to live outside the womb' to do with humanness? Whether one is a human being or not is defined as what one is not what one can do. Just because the baby lives in the womb does not change its nature. The baby is still a human being just as is the teenager who can not live outside his home, clad only in a bathing suit at Point Barrow, Alaska in January. Such a teenager is still a human being.

D. HARM TO THE MOTHER IS NOW KNOWN TO BE MUCH GREATER THAN PREVIOUSLY THOUGHT.

> The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear....Her suffering is too intimate and personal for the State to insist, *without more*, upon its own view of the woman's role.... *Casey*, p. 2807.

Now, there is more. The harm to the mother is clearly shown to be of greater potential if she has an abortion, especially an abortion in secret. (K-35) Additionally, there is harm to the father, siblings, grandparents, and most of all to the mother herself if she is inadequately informed. (K-23,24) Dr. Rue is absolute that the information mothers receive in America today, is woefully inadequate. (K-19) Anxiety? Physical constraints? Since the baby is a human being, what of her anxiety as the amniocentesis needle is thrust into her bedroom and jabs her body? What of the baby as it is drowning in its own living room being filled with saline solution? What of the burning sensation that overwhelms the baby both inside and out? What about the baby suffering burns until she has congestive heart failure or experiences the convulsions of the violent contractions of induced abortion crushing its little head and skull until it dies? These scenario are now relevant and material since we now scientifically speak of the death of a human being. (L-6,15)

The medical scientific facts tell us the human being in all its dignity and essence exists from conception. The "individual" does have a right to make "personal decisions" and to enjoy "personal dignity and autonomy". Medical science now tells us someone else needs to be included in the equation; the human being in the womb.

III. WITH SO MUCH MEDICAL SCIENTIFIC EVIDENCE COMMONLY AVAILABLE, ADDRESSING THE ISSUE OF WHEN LIFE BEGINS IS NECESSARY FOR THE INTEGRITY OF THE COURT AND THE LEGAL SYSTEM TO BE SECURED.

If it was true in the past that,"...we acknowledge that our decisions after *Roe* cast doubt upon the meaning and reach of its holding." *Casey*, p. 2803. As the Court has said, "Liberty finds no refuge in a jurisprudence of doubt." *Casey*, p. 2803

"The Constitution serves human values...." *Casey*, p. 2809. If there is a class of humans not only being denied service but being denied existence, the Constitution serves no one.

The vacuum of when life begins was left subject to the development of medical science. Once medical science made a determination of when life begins, *stare decisis* demands that such evidence comes into the record. *Stare decisis* demands this because the Court has deferred to medical science's answering the difficult question of when life begins. Such evidence is then relevant.

CHANGED FACTS AND CIRCUMSTANCES

The history of advancing the constitutional ideal is based on the facts available to the Court at the time a decision is made. In analyzing the *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S. Ct. 578 (1937), decision of the Court which overruled *Lochner v. New York*, 198 U.S., 25 S.Ct. 539 (1905). The Court made this point.[7]

We have here then as great or greater sociological issue than in *Parrish*. In discussing *Brown v. Board of Education*,

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[7] The facts upon which the earlier case had premised a constitutional resolution of social controversy had proved to be untrue, and history's demonstration of their untruth not only justified but required the new choice of constitutional principle that *West Coast Hotel* announced. *Casey* p. 2812.

347 U.S. 483, 74 S.Ct. 686 (1954) and *West Coast Hotel's* overruling of previous decisions, the *Casey* Court makes the change of fact observations for each case.[8]

It is clear there is no longer any doubt in medical science as to when human life begins. It is not a metaphysical question. (I-19) We have changed circumstances.

The Court has in the past applied new facts to abortion and accordingly modified the constitutional doctrine to be consistent with those new facts.

> We have seen how time has overtaken some of *Roe's* factual assumptions: advances in maternal health care allow for abortions safe to the mother later in pregnancy than is true in 1973, (cites omitted) and advances in neonatal care have advanced viability to a point somewhat earlier. *Casey*, p. 2811.

Defendant's evidence has much to say about maternal health, safety of abortion, the concept of neonatal life, viability and other of the great issues and assumptions of abortion as expressed in *Casey*.

If due process of law ever meant anything, it means that no one human being can have the unchecked power of life and death over another human being.

---

[8] Each case rested on facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions. Each was comprehensible as the Court's response to facts that the country could understand, or had come to understand already, but which the Court of an earlier day, as its own declarations disclosed, had not been able to perceive....[that is] application of constitutional principle to facts as they had not been seen by the Court before. In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as response to the Court's constitutional duty. *Casey*, p. 2813

The Court in *Casey* says state action must be limited so the woman's right to choose is not impaired. The right to choose what? The right appears to be the right to choose between live birth and abortion. And, what is abortion? Petitioner's evidence is clear that abortion is not just the mere terminating of a pregnancy it is the terminating of a human life. It is the interruption of the natural human developmental process by fatal trauma. This truth is what motivated Petitioner. It is this taking of a human life in addition to the psychological trauma to the mother and others petitioner sought to prevent.

The Court has never suggest that the unbridled unaccountable decision of life and death be given one human being over another human being. This would be unprecedented in Western Civilization jurisprudence since *Magna Carta*. Due process of law has been required. The possible exception being the treatment of black Americans prior to the Emancipation Proclamation.

Given the exploding quantum of medical scientific advancement since *Roe*, it has become critical and essential to determine when life begins for the human being because otherwise we not only violate precedent but exceed the tolerable limits of law and constitutional power. What was not necessary in *Roe's* time is now demanded if the courts are to maintain legitimacy.

In not unprecedented wisdom, the *Roe* Court left open the possibility that the ultimate relevant truth was yet to be discovered.

SUMMARY

When the Founding Fathers wrote, "We hold these truths to be self evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and pursuit of Happiness", the focus word, the operative word was and is "truths". The constitutional ideal is to discern truth. In our pilgrimage as human

beings we progress. When that progress reveals to us truth it then becomes incumbent upon us to respond to that truth and to weave it into the fabric of society so that it impacts society in a way consistent with the foundation of society. To do otherwise is to destroy the constitutional ideal, to destroy the legitimacy and credibility of the system and to turn our system into a government of men rather than of law built on fact.

Whatever may have been the facts at the time of *Roe*, they are no longer the facts. Not only is the resolution of the beginning of human life knowable but it is known with absolute certainty.

It has been said the *Roe* vacuum in jurisprudence rivals the decision in the *Dred Scott Case*. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). Left unattended, given the evidence of medical science Petitioner produced at trial, we stand to repeat an unthinkable part of our past. We dare not tread that still unhealed path again.

As it is:

> "...institutions are undermined, law enforcement is jeopardized, and the gap between the law and the moral order produces increasing conflict and social turmoil. Judge Ruth Bader Ginsburg, a supporter of the abortion right, has suggested that, ...*Roe* ventured too far in the change it ordered....Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict." Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C.L. Rev. 375, 381, 385 (1985).

Even worse, to ignore petitioner's medical scientific evidence is to embrace the reality that our society built on individual liberty may go down in history as perpetrating one of the greatest genocides known to man. This Court casts the final vote on that reality.

CONCLUSION

It is respectfully submitted that Petitioner's petition for certiorari should be granted and that the issues raised therein should be addressed by the Justices of this Court.

Respectfully submitted,

Steven W. Graber, P.A.
3818 East Stroud Road
Hutchinson, Kansas 67501
(316) 665-0077

Peter C. Bataillon, P.A.
7000 Spring Street
(402) 397-6200
Ohama, Nebraska 68106

Attorneys for Petitioner

Dated: September 22, 1993

IN THE SUPREME COURT OF THE STATE OF KANSAS

CITY OF WICHITA, KANSAS,
A Municipal Corporation,

Appellant,

v.

ELIZABETH ANN TILSON

Appellee.

No. 68,575

SYLLABUS BY THE COURT

1. In a criminal prosecution for trespass upon the property of an abortion clinic, wherein the defendant asserted the defense of necessity, the background, history, and elements of the common-law criminal defense of justification by necessity are discussed and considered.

2. If recognized as a defense in a criminal case, the justification by necessity defense only applies when the harm or evil which a defendant seeks to prevent by his or her own criminal conduct is a legal harm or evil as opposed to a moral or ethical belief of the individual defendant.

3. The jurisdiction by necessity defense, except as codified in statutes such as those relating to self-defense and compulsion, has not been adopted in Kansas.

4. A woman has an unfettered constitutional right to an abortion during the first trimester of pregnancy and a somewhat more restricted right to abortion thereafter. *Roe v. Wade*, 410 U.S. 113, 35 L. ed. 2d 147, 93 S. Ct. 705 (1973).

5. The defense of justification by necessity cannot be utilized when the harm sought to be avoided is a constitutionally protected legal activity and the harm incurred by the defendant's acts is in violation of the law.

6. In a criminal prosecution for trespass upon the property of an abortion clinic, the defense of justification by necessity is inapplicable and evidence if when life begins is irrelevant. The admission of evidence of when life begins is such as action was error by the trial court.

Appeal from Sedgwick district court, PAUL W CLARK, judge. Opinion filed June 28, 1993. Appeal sustained.

Sharon L. Chalker, assistant city attorney, argued the cause and Gary E. Rebenstorf, city attorney, was with her on the brief for appellant.

Steven W. Graber, of Hutchinson, argued the cause and was on the brief for appellee.

Louise Melling, of Reproductive Freedom Project, American Civil Liberties Foundation, of New York, New York, and Jim Lawing, of Wichita, were on the brief for amici curiae American Civil Liberties Union, et. al.

Richard D. Cimino, and Raphael F. Hanley, of St. Marys, were on the brief for amicus curiae Right to Life of Kansas, Inc.

John E. Cowles, of McDonald, Tinker, Skaer, Quinn & Herrington, P. A., of Wichita, was on the brief for amicus curiae Women's Health Care Services, P.A.

PER CURIAM: The City of Wichita appeals from the trial court's ruling that the justification by necessity defense absolved the defendant, Elizabeth A. Tilson, of criminal liability for her actions in trespassing on property owned by the Wichita Family Planning Clinic, Inc. (Clinic) on August 3, 1991. This appeal is taken pursuant to K.S.A. 22-3602(b)(3) on a questions reserved by the City. We sustain the appeal.

The facts are not seriously disputed. On August 3, 1991, Elizabeth A. Tilson was arrested for trespassing on property of the Clinic located at 3013 East Central in Wichita, Kansas. The Clinic does deny that it provides abortion services to some of its patients. Ms. Tilson and others were gathered at both entrances of the Clinic attempting to stop patrons from entering the Clinic. Ms. Deborah Riggs, administrator of the Clinic, asked the individuals to leave the premises. The protesters failed to respond to the request. Ms. Riggs then called Captain William Watson of the Wichita Police Department to the scene. Ms. Riggs asked Captain Watson to request the individuals to leave the Clinic premises. The protesters made no response to his command.

Ms. Tilson was subsequently arrested by Officer Gary Smith for criminal trespass in violation of Section 5.66.050(a) (1992) of the Code of the City of Wichita which provides in part:

> "Criminal trespass is entering or remaining upon or in any land, structure, vehicle, aircraft or watercraft by a person who knows he/she is not authorized or privileged to do so, and:
>
> "(a) Such person enters or remains therein defiance of an order not to enter or to leave such premises [or] property personally communicated to such person by the owner thereof or other authorized person;
>
> "Any person who commits a criminal trespass within the corporate limits of the city of Wichita shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than one thousand dollars or imprisonment which shall not exceed six months, or by both such fine and imprisonment. (Ord. No. 39-765, § 1)."

On November 13,1991, the defendant was found guilty in Wichita Municipal Court of criminal trespass in violation of the

city ordinance. The court ordered her to pay a $1,000 fine, serve six months in the Sedgwick County Adult Detention Facility, and pay all court costs. On the same date, the defendant appealed her conviction to the Sedgwick County District Court.

On January 14, 1992, the district court held a pretrial conference to determine if the court would hear evidence on the issue of when human life begins. At the hearing, the defendant noted that she would be asking the court to make the determination when life begins and at what point in time life has constitutional protection. The trial court found that evidence of when life begins ruled that it would allow the defendant to resent evidence on any common-law defense, including the defense of necessity.

At trial, the defendant admitted that she blocked the entrance to the Clinic but asserted that her actions were excused by the necessity defense. Specifically, she claimed her actions were justified because "abortion takes the life of an unborn baby, and I wanted to prevent that, and I wanted to prevent the detrimental effect that happens to the woman, the father of the baby, the grandparents and brothers and sisters involved." There was no evidence introduced, and no claim has been made by defendant, that the abortions performed by the Clinic were illegal or that the Clinic was operating in any illegal manner. Defendant in her brief, as she did before this court, takes great umbrage with being on a "rescue" mission. By whatever name or designation she chooses to be known, it is admitted that she violated the criminal code of the City of Wichita.

On July 20, 1992, following a three-day bench trial, Judge Paul Clark held that the defendant had violated § 5.66.050(a) of the Code of the City of Wichita. He further held, however, that the defendant was absolved of any criminal liability for her actions, based upon the necessity defense. Judge Clark, in a 25-page memorandum opinion, held that the doctrine of justification ny necessity was recognized under Kansas law. He

additionally held that the doctrine was applicable to the defendant's actions and justified her trespassing upon the Clinic property for the purpose of saving a human life. At trial, over the objections of the City, the defendant was allowed to introduce expert testimony on the question of when life begins. The City did not attempt to controvert such evidence but instead took the position that the evidence was inadmissible because it was irrelevant to the issues before the court and that the necessity defense did not apply to the charges in this case.

Pursuant to K.S.A. 22-3602(b)(3), the City of Wichita timely appeals from the trial court's holding that the necessity defense was applicable to the defendant's act of criminal trespass on the property of the Clinic.

The issues as stated by the City in its docketing statement read:

> "1. Did the District Court err in holding that the necessity defense was recognized by Kansas law on August 3, 1991?
>
> "2. Did the District Court err in concluding that the necessity defense was applicable to the facts of this case thereby discharging the Defendant from criminal liability for her actions in violating Section 5.66.050(a) of the Code of the City of Wichita?"

The City contends that the trial court erred in concluding that the necessity defense was recognized by Kansas law and applied to defendant's criminal acts of trespass. These issues are questions of law subject to broad appellate review. *State, ex rel., v. Doolin & Shaw*, 209 Kan. 244, 497 P. 2d 138 (1972).

Before turning to the specific issues on appeal, some background on the necessity defense is seemed advisable. Necessity is a common-law defense recognized in some jurisdictions, while in others it has been adopted by statute. Several states which have no statute on the defense have not determined

whether the common-law defense will be recognized. It has been referred to by various terms, including, "justification," "choice of evils." or "competing harms." Depending upon the jurisdiction various elements must be proven in order for a defendant to establish the defense. Section 3.02 of the Model Penal Code, adopted by a number of states and relied upon by the City, provides one formulation of the necessity defense:

> "(1) Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:
>
> (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
>
> (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
>
> (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear." Model Penal Code § 3.02 (1962), 10 U.L.A. 477 (1962).

In his treatise on criminal law defenses, Professor Robinson explains the necessity defense another way:

> "The lesser evils defense, sometimes called 'choice of evils' or 'necessity' or the general justification defense, is recognized in about one-half of American jurisdictions. It is perhaps the best illustration of the structure and operation of justification defenses generally. It explicitly relies upon the rationale inherent in all justifications: while the defendant may have caused the harm or evil contemplated by an offense, given the justifying circumstances, he has not caused a net harm or evil and is therefore to be

exculpated. The principal of the is general justification defense may be stated as follows:

"Lesser Evils. Conduct constituting an offense is justified if:

"(1) any legally-protected interest is unjustifiably threatened, or an opportunity to further such an interest is presented; and

"(2) the actor engages in conduct, constituting the offense,

(a) when and to the extent necessary to protect or further the interest,

(b) that avoids a harm or evil or furthers a legal interest greater than the harm or evil caused by actor's conduct." 2 Robinson, Criminal Law Defenses §124(a) pp. 45-46 (1984).

Necessity is generally considered to be an affirmative defense that must be proven by the defendant, usually beyond a reasonable doubt. *State v. O'Brien*, 784 S.W. 2d 187, 189 (Mo. App. 1989). Also, "[t]he burden of production for the defense of lesser evils (choice of evils, necessity) is always on the defendant." 2 Robinson, Criminal Defenses § 124(a) p. 47. However, some jurisdictions treat the defense as an "ordinary" defense that must be disproved by the prosecution beyond a reasonable doubt. See, e.g., *Commonwealth V. Brugmann*, 13 Mass. App. 373, 379, 433 N.E. 2d 457 (1982).

Regardless of what name is attached to the defense (and for the sake of simplicity we will refer to it as the necessity defense) one thing is clear; The harm or evil which a defendant, who asserts the necessity defense, seeks to prevent must be a legal harm or evil as opposed to a moral or ethical belief of the individual defendant.

The City contends that there is no judicial decision in Kansas which expressly recognizes the necessity defense. It notes that the trial court relied upon *State v. Taylor*, 138 Kan. 407, 26 P.2d 598 (1933), for its determination that the defense was recognized under Kansas law. The City, however, correctly points out that the defense of necessity was not an issue in *Taylor*, nor did the case set forth the elements of such a defense.

In *Taylor*, the defendant was charged with shooting his estranged wife and her brother. The defendant attempted to remove one of his children from the home of his brother-in-law. The defendant alleged that he acted in self-defense in shooting his brother-in-law. *Taylor*, however, does not mention or recognize the necessity defense. The passage from *Taylor* relied upon by the trial court in its memorandum opinion has no bearing upon the defense of necessity. *Taylor* does not support the trial court's holding that the necessity defense is recognized under Kansas law.

The City then observes that the only reported case in Kansas which discusses but failed to recognize the necessity defense is *State v. Greene*, 5 Kan. App. 2d 698, 623 P.2d 933 (1981). In *Greene* the defendants, protesters at the Wolf Creek nuclear power plant, asserted that the compulsion defense set forth in K.S.A. 21-3209(1) relieved them of criminal liability. The Kansas Court of Appeals held that the defendants were not entitled to an instruction regarding the compulsion defense because the defense did not apply to acts which the legislature had expressly concluded not to be criminal. In *Greene* the issue involved the applicability of the statutory compulsion defense which may be related to or synonymous with the necessity defense in some jurisdictions and/or under certain circumstances. In considering the compulsion defense as it applied to activities of the defendants, who were opposed to nuclear power, at the Wolf Creek nuclear power plant, the court did discuss several cases wherein the defense has been asserted at nuclear

power plants, but ut did not recognize the necessity defense as viable in Kansas. In fact, the defendant conceded in her brief, "*State v. Greene*, 5 Kan. App. 2d 698, 623 P.2d 933 (1981), does not apply. It does not address the justification defense." Additionally, amicus curiae Right to Life of Kansas, Inc., asserts in its brief, "We concur with the Appellant's statement that Kansas has never expressly adopted or recognized the necessity defense." Our own research confirms that the parties and amicus are correct and that the necessity defense, except as codified in statutes such as those relating to self-defense and compulsion, has not been adopted or recognized in Kansas. Nor do we find it necessary in the resolution of this appeal to make such a determination. Whether the necessity defense should be adopted or recognized in kansas may best be left for another day.

The issue before us is simply whether the necessity defense, if it were recognized, even applies at all in a case such as this one. Although we decline to specifically determine whether the necessity defense should be adopted or recognized in Kansas, to decide the issue before us it is necessary to consider the issue in light of the necessity defense and its applicability to the charges in this case.

It is established, beyond any argument, that since 1973 a woman has an unfettered constitutional right to an abortion during the first trimester of pregnancy and a somewhat more restricted right to abortion thereafter. *Roe v. Wade*, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973). In that case the Supreme Court held:

> "(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
>
> "(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses,

> regulate the abortion procedure in ways that are reasonably related to maternal health.
>
> "(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Roe v. Wade*, 410 U.S. at 164-65.

The City maintains that because no legal harm is caused by an abortion, "the harm caused by the defendant's criminal acts exceeds the harm sought to be prevented by the City's ordinance." The City notes that defendants in several jurisdictions have raided the necessity defense in situations involving trespass or public protest, including those against abortions, and that the "overwhelming majority of jurisdictions have rejected the defense."

Numerous courts have considered whether the necessity defense applies to abortion trespass cases. See Annot., "Choice of Evils." Necessity, Duress, or Similar Defense to State or Local Criminal Charges Based on Acts of Public Protest, 3 A.L.R. 5th 521.

Every appellate court to date which has considered the issue has held that abortion clinic protesters, or "rescuers" as they prefer to be called, are precluded, as a matter of law, from raising a necessity defense when charged with trespass. See *Allison v. City of Birmingham*, 580 So. 2d 1377 (ala. Crim. App. 1991) , cert. denied 580 So. 2d 1390 (ala. 1991); *Clevland v. Municipality of Anchorage*, 631 P.2d 1073 (Alaska 1981); *Pursley v. State*, 21 Ark. App. 107, 730 S.W. 2d 250 (1987), rev. refused July 22, 1987; *People v. Garziano*, 230 Cal. App. 3d 241, 281 Cal. Rptr. 307, rev. denied Cal. 3d (August 1, 1991), cert. denied 116 L. Ed 2d 750 (1991)l *State v. Clarke*, 24 Conn. App. 541, 590 A.2d 468, cert. denied 219 Conn. 910 (1991; *Gaetano v. United States*, 406 A.2d 1291 (D.C. 1979);

Hoover v. State, 297 Md. 660, 467 A. 2d 483 (1983); *State v. O'Brien*, 784 S.W. 2d 187 (Mo. App. 1989); *State v. Cozzens*, 241 Neb. 565, 490 N.W. 2d 184 (1992); *People v. Crowley*, 142 Misc. 2d 663, 538 N.Y.S. 2d 146 (1989); *State v. Thomas*, 103 N.C. App. 264, 405 S.E.2d 214, cert. denied 329 N.C. 792 (1991); *State v. Sahr*, 470 N.W. 2d 185 (N.D. 1991); *Kettering v. Berry*, 57 Ohio App. 3d 66, 567 N.E. 2d 316 (1990); *State v. Clowes*, 310 Or. 686, 801 P.2d 789 (1990); *Com. v. Wall*, 372 Pa. Super, 534, 539 A. 2d 1325, appeal denied 521 Pa. 604 (1988(; *State v. Morton*, 1991 W L 80204 (Tenn. Cr. App.) (unpublished op.), appeal denied (1991); *Crabb v. State*, 754 S.W. 2d 742 (Tex. App. 1988(, cert. denied 493 U.S. 815 (1989); *Buckely v. City of Falls Church*, 7 Va. App. 32, 371, S.E.2d 827 (1988).

The only reported case which we have found that recognized the necessity defense in an abortion clinic/trespass case is a Rochester, New York, city court case. *People v. Archer*, 143 Misc. 2d 290, 537 N.Y.S. 2d 726 (1988). The decision in *Archer* was limited to late-term abortions, and in its opinion the court recognized that *Roe* prohibits the State statutory necessity defense whenever there are intentional interruptions which interfere with the performance if first trimester abortions." 143 Mics. 2d at 403. *Archer* is not persuasive on any issue before this court and is inapplicable to the facts here.

The courts have invoked several difference rationales in rejecting application of the defense. The majority of courts reason that because abortion is a lawful, constitutionally protected act, it is nota legally recognized harm which can justify illegal conduct.

In *State v. O'Brien*, 784 S.W. 2d 187 (mo. App. 1989), the defendant was charged with trespass at an abortion clinic and, as in our case, asserted the necessity defense, contending she was on a rescue mission to save and protect unborn children. She attempted, as defendant did here, to introduce evidence of

when life begins in support of her defense. The Missouri court stated:

> "Since abortion remains a constitutionally protected right, the defense of necessity must be viewed in that context.
>
> "Viewed in that setting every court which has considered the defense of necessity has for various reasons, rejected it when asserted in trespass-abortion proceedings...
>
> "In short, the defense of necessity asserted here cannot he utilized when the harm sought to be avoided (abortion) remains a constitutionally protected activity and the harm incurred (trespass) is in violation of the law". 784 S.W.2d at 192.

Another court has reasoned:

"Through judicial decision and legislative determination denying abortion recognition as a harm, the law has preempted the central inquiry of the necessity defense: whether the activity sought to be stopped or the criminal conduct employed to stop it is the 'greater harm.' By determining that the greater harm per e is in the criminal conduct. The defense of necessity which has been created by the law may not, therefore, be employed to justify or excuse it." *Kettering v. Berry*, 57 Ohio App. 3d at 68-69.

In *Com. v. Markum*, 373 Pa. Super. 341, 541 A.2d 347, appeal denied 520 Pa. 615 vert. denied 489 U.S. 1080 (1988), the defendants were convicted of criminal trespass. They alleged that the crimes were justified to prevent the loss of a human life. The court held that the necessity defense was unavailable because a woman's right to obtain an abortion was protected by the United Stated Constitution. The court stated:

> "As we have noted, pre-viability abortion is lawful by virtue of state statute and federal constitutional law.

> The United States Supreme Court, from *Roe* through its progeny, has consistently held that the stat's interest in protecting fetal life does not become compelling, and cannot infringe on a woman's right to choose abortion, until the fetus is viable. *Roe* at 163-64, 93 S. Ct. at 732. Appellants do not suggest that viability and conception are simultaneous occurrences. We find that a legally sanctioned activity cannot be termed a public disaster." *Com. v. Markum*, 373 Pa. Super at 349.

In *People v. Krizka*, 92 Ill. App. 3d 288, the defendants were charged with trespass on medical center property to prevent abortion. The defendants asserted the necessity defense based upon their contention that life begins at conception and that they were attempting to save lives. The court stated:

> "Defendants here contend that they had to commit the acts of criminal trespass in order to prevent the deaths of fetuses, which they perceived as the greater injury. We disagree with defendants' contention because the 'injury' prevented by the acts of criminal trespass is not a legally recognized injury." 92 App. 3d at 290.

After briefly discussing *Roe* and its progeny, the court continued:

> "We therefore concludē that defendants did not engage in illegal conduct because they were faced with a choice of evils. Rather, they intentionally trespassed in complainant's property in order to interfere with the rights of others....Under *Roe*, an abortion during the first trimester or pregnancy is not a legally recognizable injury, and therefore, defendants' trespass wa snot justified by reason of necessity.
>
> "Defendants attempt to circumvent the effect of *Roe* and to bolster their defense of necessity by arguing that they reasonably

believed that they acted to prevent the destruction of human life. They point to language in *Roe* in which the court declined to speculate on when human life begins. [Citation omitted.] Defendants argue that life begins at time of conception, and that they were denied due process of law because the trial court refused to admit evidence which was proffered to support this contention.

"True, in *Roe*, the court acknowledged the existence of competing views regarding the point at which life begins. However, the Court declined to adopt the position that life begins at conception, giving recognition instead to the right of a woman to make her own abortion decision during the first trimester. [Citation omitted.] We do not believe that the Court in *Roe* intended courts to make a case-by-case judicial determination of when life begins. We therefore reject defendants' argument." 92 Ill. App. 3d at 290-91.

In *State v. Sahr*, 470 N.W.2d 185 (N.D. 1991), the court was faced with an abortion-trespass case in which the defense was, again, the same as that asserted by the defendant in the present case. The defendants in *Sahr* asserted the necessity defense based upon their beliefs that life begins at conception and their actions were justified to save innocent human lives. The court discussed at some length the necessity defense and, having done so, stated:

> "As a result, we conclude that we need not determine the precise scope of the necessity defense available in this state. In our view, the defendants' criminal trespass at medical clinics to prevent legal abortions may not be justified under any reasonable formulation of the necessity defense.
>
> "The evil, harm, or injury sought to be avoided, or the interest sought to be promoted, by the commission of a crime must be legally cognizable to be justified as necessity. '[I]n most cases of civil disobedience a

> lesser evils defense will be barred. This is because as long as the laws or policies being protested have been lawfully adopted, they are conclusive evidence of the community's view in the issue.' 2 P. Robinson, *Criminal Law Defenses* § 124(d) (1), at 52. Abortion in the first trimester of pregnancy is not a legally recognized harm, and, therefore, prevention of abortion is not a legally recognized interest to promote.
>
> "The elements of a legally cognizable injury for the necessity defense has been identified repeatedly in decisions on other criminal attempts to protest abortions at medical clinics...In sum, a claim if necessity cannot be used to justify a crime that simply interferes with another person's right to lawful activity." 470 N.W.2d at 1291-192.

Finally, in *Com. v. Wall*, 372 Pa. Super. 534, the court was faced with the same arguments and after reviewing the necessity defense the court held the necessity defense did not apply in an abortion-trespass setting. The court found that the defendants had failed to establish any of the requirements to justify a necessity defense. Having done so, the court went on to state:

> "Despite the above [the appellant's inability to satisfy any of the elements of the necessity defense], appellant nevertheless insists that he was justified in violating the law in this case because his actions were motivated by higher principals. To accept appellant's argument would be tantamount to judicially sanctioning vigilantism. If every person were to act upon his or her personal beliefs in this manner, and we were to sanction the act, the result would be utter chaos. In a society of laws and not of individuals, we cannot allow each individual to determine, based upon his or her personal beliefs, whether another person may exercise her constitutional rights and then allow that

> individual to assert the defense of justification to escape criminal liability. We recognize that, despite our proscription, some individuals, because of firmly held and honestly believed convictions, will feel compelled to break the law. If they choose to do so, however, they must be prepared to face the consequences. Thus, such private attempts to circumvent the law with the aim to deprive a pregnant woman of her right to obtain an abortion will not be tolerated by this Court. Accordingly, for the reasons set forth above, we conclude that the trial court properly determined that appellant was not entitled to raise the justification defense." 372 Pa. Super. at 543-44.

We concur with the statements of the Pennsylvania court and others cited herein. To allow the personal, ethical, moral, or religious beliefs of a person, no matter how sincere or well-intended, as a justification for criminal activity aimed at preventing a law-abiding citizen from exercising her legal and constitutional rights would not only lead to chaos but would be tantamount to sanctioning anarchy.

Defendant argues that as she had expert medical testimony that life begins at conception, the necessity defense must be allowed. We do not agree. When the objective sought is to prevent by criminal activity a lawful, constitutional right, the defense of necessity is inapplicable, and evidence of when life begins is irrelevant and should not have been admitted.

While we could review the myriad of other cases on the specific issue before us, nothing would be gained by doing so. As stated earlier, all of the appellate court decisions hold that the necessity defense is not applicable in abortion-trespass criminal prosecution. We again point out that our opinion should not be construed as an indication that we recognize or adopt the necessity defense as the law in Kansas. We make no such determination here. Defendant has wholly failed to

demonstrate that the necessity defense would apply to this case even if the defense was recognized.

The appeal is sustained.

Petitioner's Answer to Docketing Statement Dated 9-13-92

IN THE SUPREME COURT
OF THE STATE OF KANSAS

City of Wichita

v.

Elizabeth Tilson

District Court No. 91MC108

DOCKETING STATEMENT—ANSWER

1. STATEMENT OF FACTS:

A. Defendant claims not that her actions were to prevent harm to society at large but specifically to rescue the lives of baby human beings. Further, she acted to rescue the mothers, fathers, siblings, grandparents and others from the harm of abortion.

B. Defendant claims, these harms of abortions were far greater than any harm caused the clinic by her simple nonviolent non damaging trespass to the real property owned by the clinic.

C. At the pre trial conference Defendant requested the Court to determine the issues of when life begins and when that life is legally cognizable. Before offering the necessity defense it was needful to resolve these issues.

2. ISSUES:

A. Did the Court properly conclude that life begins at conception?

B. Did the Court properly conclude that Defendant went on the property to rescue life?

C. Does the law value the preservation of human life over simple non violent, non damaging entry (trespass) onto real property?

Clerk's Use Only

Attorney's Signature

Steven W. Graber
STEVEN W. GRABER

Date: 9-13-92

Certificate of Service Attached

Respondent's Docketing Statement Dated August 31, 1992

IN THE SUPREME COURT
OF THE STATE OF KANSAS

CITY OF WICHITA, KANSAS,
A Municipal Corporation,

Plaintiff,

v.

ELIZABETH A. TILSON,

Defendant.

County Appealed From: Sedgwick
Trial Judge: Paul W. Clark
District Court No. 91MC108

GARY E. REBENSTORF
Director of Law
SHARON CHALKER
Assistant City Attorney
City Hall - 13th Floor
455 North Main
Wichita, Kansas 67202
(316) 268-4681

DOCKETING STATEMENT - CRIMINAL

1. Conviction of offenses and statutes: Defendant was charged with violation of Section 5.66.050(a) of the Code of the City of Wichita, Kansas, which pertains to Criminal Trespass. The Defendant was not convicted. This is an appeal by the City of Wichita from the dismissal of the charge on a question reserved by the City pursuant to K.S.A. 22-3602(b)(3).

2. Jurisdiction:–

   a. Date sentence was pronounced from the bench: Memorandum opinion filed on July 21, 1992 and Journal Entry filed August 31, 1992.

   b. If applicable, date imposition of sentence was suspended; not applicable.

   c. Date any motion to modify sentence was filed: not applicable.

   d. Date disposition of any motion to modify sentence was filed: Not applicable.

   e. Date Notice of Appeal filed in District Court: August 14, 1992.

   f. Is defendant free on bond: not applicable.

   g. If not, where is defendant incarcerated: not applicable.

3. Statement of Material Facts:

On August 3, 1991, the Defendant entered onto property owned by the Wichita Family Planning Clinic, Inc. located at 3013 East Central in Wichita, Kansas. The Defendant was not authorized or privileged to enter onto such property and she refused to obey the order of an authorized law enforcement officer to leave the premises.

The Defendant claims that her actions were excused by the necessity defense because the harm caused to society by her entry onto the property was less than the harm caused ny the abortions performed by the clinic.

Section 5.66.050(a) of the Code of the City of Wichita makes it unlawful for any person to enter or remain upon any land of another when such person knows he/she is not authorized or privileged to do so and such person enters or remains therein in defiance personally communicated to such person by the owner thereof or other authorized person.

4. Issues to be presented:

    1. Did the District Court err in holding that the necessity defense was recognized by Kansas law on August 3, 1991?

    2. Did the District Court err in concluding that the necessity defense was applicable to the facts of this case thereby discharging the Defendant from criminal liability for her actions in violating Section 5.66.050(a) of the Code of the City of Wichita?

Office Of The City Attorney
of Wichita, Kansas

Sharon L. Chalker
Sharon L. Chalker
Date: August 31, 1992

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing Docketing Statement - Criminal, was mailed,postage paid,to Steven Graber, Attorney at Law, 3818 East Stroud Road, Hutchinson, Kansas 67501, by placing the same in the United States mail, this 31st day of August, 1992.

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

CITY OF WICHITA,

Plaintiff,

v.

ELIZABETH A. TILSON,

Defendant.

Case No. 91 MC 108

MEMORANDUM OF OPINION
FOLLOWING BENCH TRIAL

In compliance with the provisions found at K.S.A. 22-3609 and K.S.A. 12-4601, Mrs. Tilson appeals a ruling made by the Municipal Court of the City of Wichita, Kansas, wherein she was found to have violated a city ordinance prohibiting "criminal trespass" (5.66.050, 12-31-89, the Code of the City of Wichita, Kansas) for which she was ordered to pay a fine of $1,000.00, serve six (6) months in the Sedgwick County Adult Detention Facility, and pay court costs of $27.00. She has waived her right to trial by jury (Kan. B.O.R. Sec. 10; U.S. Constitution, Am. 6).

August 3, 1991 is the date of the occurrence resulting in the prosecution. The place was within the corporate city limits of the City of Wichita, Kansas.

Those participants whose actions on the date of occurrence are material to the issues presented here are as follows:

A corporate entity was there. It was an Ohio, for-profit corporation, authorized to do business in the State of Kansas. To do its business, the company kept a commercial building on real property at the place of occurrence. It invited the public there to purchase a service from the corporation. The company

hired physicians to render the service. The service was the performance of certain medical procedures that result in the termination of pregnancy other than by live birth.

Certain members of the public were there that day as business invitees. They were there to purchase the service.

Mrs. Tilson was there on the date of occurrence. Here are a few of her reasons:

> "Because I know that they perform abortions there and abortion takes the life of an unborn baby and I wanted to prevent that and I wanted to prevent the detrimental effect that happens to the woman, the father of the baby, the grandparents and brothers and sisters involved."
>
> Because that was the date that the pastors were going to rescue and many of my friends were there and I felt impressed by the Holy Spirit to be there."

The evidence proffered to prove those acts of the participants done on the date and at the place of occurrence that precipitated the prosecution of Mrs. Tilson are summarized below:

Mrs. Tilson entered upon the corporate property as any other member of the public could do. She did not, however, enter the building. Her purpose was not to purchase a service. Her purpose was to stand on the walkway in front of the entrance so as to impede those business invitees trying to enter the company's building to purchase the service offered there. While so situated, she did not say nor do anything except perhaps participate in a song of praise for or a prayer to the same "Supreme Judge of the World" upon whom Messrs. Hancock, Adams, Jefferson, Franklin, Clark and their colleagues at Philadelphia in 1776 relied "for the rectitude of [their] intentions..." (The Declaration of Independence, Kansas and United

States Constitution Pg. 159 @ 160, 1988). The police say that they heard such activity.

Mrs. Tilson testified that by hindering the purposes of corporate business invitees, she hoped to give others united in cause with her an opportunity to ask the invitees to reverse their decisions to buy the corporation's service. Mrs. Tilson calls these colleagues of hers "sidewalk counselors." Her colleagues were in place on the public sidewalks and certain real property adjoining the corporate real property for the purpose of attracting the attention of the business invitees through verbal or visual communication and thereby endeavor to dissuade the invitee.

Mrs. Tilson takes umbrage at any attempt to label her an "abortion protestor." She says that she was not there to protest anything. Her goal was to "rescue" the unborn,their progenitors and the families of both from the ill effects that might follow termination of pregnancy.

At this stage the police were summoned to the place of occurrence and asked by the corporate "authorized person" (5.66.050, Code, City of Wichita, Kansas, Supra, ibid) to remove any person from the premises who was not there to purchase or participate in the service offered by the corporation.

A Deputy Police Chief of the City testified at trial that he broadcast this request in such a way that Mrs. Tilson did or should have known of it. She did not move. A police officer then placed her under arrest for criminal trespass. She accompanied the policeman to jail without further incident (State's Exhibit No. 1).

Exhibit No. 4 is the city ordinance in question here. That part pertinent is this:

> "Criminal trespass is ... remaining upon ... any land ... by a person who knows ... she is not authorized or privileged to do so, and: (a) such person ... remains therein in defiance of an order ... to leave such

premises ... personally communicated to such person by ... [an] ... authorized person: ..."

Mrs. Tilson violated the ordinance. She admits as much under oath, thereby removing any reasonable doubt left following the City's case in chief. She asks for a finding of not guilty, however, claiming at Page 3 of her trial brief, that:

"...she was justified to go on the property ... as such entry was necessary to protect human life and health. ... such entry ... is a lesser evil than either the taking of the lives of the babies ... or the potential harm to the mothers, and other affected persons ..."

The defense of justification by necessity relieves her of criminal responsibility under the facts here, she says.

The City contest the applicability of the defense of justification by necessity. At Page 12 of its trial brief, the reason is stated in this way:

"... because the harm (abortion) sought to be prevented is not a legally recognized injury ..., there were legal alternatives available to the defendant. ... the legislature has effectively excluded the prevention of abortion as a justification for the commission of a crime. ..."

At common law, justification by necessity developed as a doctrine whereby under certain factual situations, the perpetrator is forgiven an act otherwise criminal.

The mindset supporting the doctrine is set out in a part of Magna Carta (15 June 1215) where those men, who for one brief moment of time were charged with administering the government, reaffirmed by mutual agreement that:

"No free man shall be seized, or imprisoned, or dispossessed, or outlawed, or in any way destroyed; nor will we condemn him, nor will we commit him to

> prison excepting by the legal judgment of his peers, or by the law of the land. To none will we sell, to none will we deny, to none will we delay right or justice."

The first ten amendments to the Constitution of the United States (25 September 1789) are but reaffirmation of these basic principles of freedom following more than 500 years of practice. All 16 amendments following find root there.

The Bill of Rights incorporated into the Constitution of the State of Kansas (proposed 29 July 1859; adopted by the people 4 October 1859) is but reaffirmation of the same basic principles following 644 years of practice.

The common law is whence our jurisprudence evolved in North America. In Kansas our Supreme Court said:

> "From the beginning of our history, the common law of England has been the basis of the law ... and except as modified by constitutional or statutory provisions, by judicial decisions, or by the wants and needs of the people, it has continued to remain the law of this state." (*Clark vs. Allaman*, 71 Kan. 206, 80 Pac. 571; *Fergus vs. Tomlinson*, 126 Kan. 427, 268 Pac. 849; *State, ex rel vs. State Bd. of Ag.*, 158 Kan. 603 at 605, 149 P.2d 604; *In re Frye*, 173 Kan. 392; 246 P.2d 313; *Gonzales vs.A.T.S.F.*, 189 Kan. 689, 371 P.2d 193; *Hoffman vs. Dantel*, 192 Kan. 406, 388 P.2d 61)

In *Perkins on Criminal Law* (Foundation Press, Inc., 1957) at page 848, justification by necessity is explained in this manner:

> "Where the act done was necessary or reasonably seemed to be necessary, to save life or limb or health, and did not in itself in any way endanger life, limb or health, the exculpatory effect of the necessity is too clear for argument; but where the offense charged is not one of particular gravity, the courts have not

hesitated to recognize necessity as an excuse where the danger, or apparent danger to be avoided was less serious in its nature. Thus one unavoidably caught in a traffic jam is not guilty of violating the law which forbids stopping at that place, and a carrier has not violated the statute which requires a specified coach if the failure to provide that coach on a particular trip was due to an unavoidable accident which ordinary prudence could not have guarded against. These are not situations, it should be noted, in which no choice is possible. The driver elected to stop rather than proceed until his vehicle was brought to a halt by actual contact with the one ahead, and the carrier could have avoided sending the train without the specified coach by sending no trial at all. The harm threatened in these cases, moreover, is not to life or limb or health. The motorist is excused for stopping even if proceeding so slowly that the bumper-to-bumper contact would cause neither personal injury nor appreciable property damage, and the carrier would have suffered only financial loss by complying with the letter of the law. In another case, it may be added, the court reversed a conviction of killing a deer in violation of the game laws because it was shown this killing was reasonably necessary to prevent substantial damage to defendant's property."

The federal courts recognize the doctrine (*U.S. vs. Simpson*, 460 F.2d 515, 9th Cir. 1972; *U.S. vs. Seward*, 687 P.2d 1270, 10th Cir. 1983).

Neither party cites Kansas case law treating the doctrine. *State vs. Taylor*, (138 Kan. 407, 26 P.2d 598), though not dispositive, is instructive on the subject. The defendant had appealed his conviction, claiming error in an instruction given the jury at his trial. It seems that defendant and his wife were

estranged with the wife and children taking shelter at her brother's house. Defendant appeared there and in spite of his wife's protestations, exercised his parental right to custody of a child. Defendant shot the brother because he tried to intervene in defendant's efforts to exercise his parental rights.

The jury instruction complained of, in that part pertinent, explained the law in this manner:

"11. The defendant, George Taylor, and Bessie Taylor, his wife, ordinarily would have an equal right to the custody of their children, and either one of them would have the right to repel, reasonably, any invasion of their right to such custody; however, I believe that if the defendant, George Taylor, and his wife were estranged, and Bessie Taylor had for some time had the unopposed possession of her children, and there was an attempt on the part of George Taylor to take one or more of his children from her by force, over her objections, then her brother, Everett Christenson, would be justified in rendering her such reasonable assistance as be necessary to prevent George Taylor from taking any of the children from her. On the other hand, Everrett Christenson, had no right to the care, custody or control of the Taylors' children, independent of the desires or wishes of his sister, Bessie Taylor, and if, of his own motion, he interfered with George Taylor, in his parental control over one of his children and resorted to force against Taylor, then Taylor would be justified in enforcing his right to the custody of the children ..."

The Supreme Court of Kansas said of the instructions (Page 413) "We think they were a fair statement of pertinent law."

The City claims that "the legislature has effectively excluded the prevention of abortion as a justification for the commission of a crime..." (Page 12, trial brief). At closing argument, the City pointed to H.B. 2646 Sec. 6 (a) (2) where the legislature did in part define criminal trespass as:

> "... (2) entering or remaining upon private land or structure in a manner that interferes with access to or from any health care facility ..."

That law (H.B. 2646) is effective from and after July 1, 1992. It does not have the effect on this case that the City would give it.

I will this day hold that the doctrine of justification by necessity was legally recognized in the State of Kansas on August 3, 1991. The roots are anchored in common law. The purpose is to protect the people from their government by an assurance that in all matters right will be done and justice rendered.

The doctrine is found at A.L.I. Model Penal Code, Sec. 3.02. It is instructive as a guide for practical application. These are the elements:

> "(1) Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that: (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and (b) neither the Code nor other law defining the offense provides exception or defenses dealing with the specific situation involved; and (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear."

As aforesaid, Mrs. Tilson admits violation of the ordinance. No "legislative purpose to exclude" the defense is applicable to this set of facts. No exceptions or defenses are set out in the ordinance or other law.

The provisions of (b) and (c) above contain no exclusion of the doctrine. We will then turn to the provisions of (a).

The "harm or evil" sought to be avoided by Mrs. Tilson through her violation of law on August 3, 1991 was the prema-

ture termination of pregnancy and the harm that may flow therefrom.

The City argues that premature termination of pregnancy is not "harm or evil" nor is it a wrong to be compared with Mrs. Tilson's defiance of a police order because *Roe vs. Wade*, (401 U.S. 113, 35 L.Ed 147, 93 S.Ct. 705) set the law whereby the Constitution guarantees a right whereby a pregnant woman, during the first trimester, may make a decision whether to terminate her pregnancy without governmental interference in that decision.

Those are the positions. To resolve the issue, we need to explore some general concepts of constitutional law, the history of law in Kansas and apply the same to the facts.

Every female at the site of occurrence on August 3, 1991 had a right to make an individual decision whether to terminate pregnancy (*Roe vs. Wade, Supra*). Any member of the public there that day had a right to purchase a service from the corporation.

The corporation had a right to do business there on that day. It was so authorized by the State of Kansas.

Mrs. Tilson had a 1st Amendment (United States Constitution) and Section 11 (Kansas Constitution) right to express her opinion on any subject concerning governmental action or nonaction. Her opinion could be expressed by action, nonaction or words (*Texas vs. Johnson*, 491 U.S. 397, 105 L.Ed.2d 342, 109 S.Ct. 2533; *U.S. vs. Eichman, et al*, 496 U.S. ,110 L.Ed.2d 287, 110 S.Ct.).

None of these individual rights are subservient to others. As with all constitutionally protected rights, each here involved has parameters (*Burson vs. Freeman*, 504 U.S. ,119 L.Ed.2d 5, 112 S.Ct. Decided May 26, 1992; *Michigan Department of Police vs. Sitz, et al*, 496 U.S. , 110 L.Ed.2d 412, 110 S.Ct. (1990); *Roe vs. Wade, Supra*; *State vs. Cleveland*, 205 Kan. 426,

469 P.2d 251; *State vs. Great American Theater*, 227 Kan. 633, 608 P.2d 951; *State vs. Crouch*, 192 Kan. 602, 389 P.2d 824). The Bill of Rights, federal and state, is law that protects the people from their government. Neither was meant to protect people from fellow citizens (*Burdeau vs. McDowell*, 41 S.Ct. 574, 65 L.Ed. 1048, 256 U.S. 465).

The City of Wichita's ordinance prohibiting "criminal trespass" (Ex. 4, *Supra*) protects the right of a corporation and its business invitees to do lawful business without interference. In this particular case, the ordinance can be viewed as establishing parameters on Mrs. Tilson's right to be on business property for the purpose of expressing an opinion.

When Mrs. Tilson remained on the corporate property "in defiance of an order ... to leave such premises ... personally communicated to ..." her by the police, she violated the law. The question then becomes is her violation excused by the doctrine of justification by necessity under the facts here presented?

Mrs. Tilson points out that her act of defiance "did not in itself in any way endanger life, limb or health" (*Perkins*, *Supra*).

The City's evidence proves that the corporation did business on August 3, 1991, but only after Mrs. Tilson was removed by the police.

The defense evidence shows that the corporation lost business that day, perhaps indirectly by Mrs. Tilson's conduct. A Ms. Tina McLaughlin gave evidence at trial. She said that she went to the scene of the occurrence on the day Mrs. Tilson was there. She was a member of the public, there to have a medical procedure done for the purpose of terminating her pregnancy. Ms. McLaughlin left the scene because of the activity there before she had the medical procedure. She later made contact by telephone with Mrs. Tilson's colleagues and made an appointment to talk. After the talk, she reversed her decision to terminate her pregnancy prematurely. Her pregnancy went to

term, whereupon a normal, healthy girl was delivered. The girl is named Destiny. She sat on her mother's lap during the testimony of her mother.

The overall evidence proves that those members of the public there that day as business invitees were at the least inconvenienced and at the most, obstructed because of Mrs. Tilson's act. No one was prevented from carrying out a decision to terminate a pregnancy that day, so far as the evidence shows.

Mrs. Tilson was on that day a housewife and mother from Wichita, Kansas, whose formal education terminated prior to the 12th grade, but who has been awarded a Kansas State High School Equivalency Diploma (K.S.A. 72-4530; K.A.R. 91-10-1). Her training in obstetrics and gynecology is limited to the practical gained through experiences as a mother and woman, so far as the evidence here shows. As to the fields of human genetics and histogenesis of homo sapiens while en ventre sa mere, her knowledge comes from a magazine article (Life Before Birth, *Life*, April 30, 1965; Defense Exhibit B). Practical experience gained by personal actions and observations in human relationships constitute her psychological knowledge. So for as the evidence here proves, she probably has limited knowledge of and little interest in concepts of constitutional law evolving as American jurisprudence from the common law of England.

She sees through her heart. Her inner voice tells her that the premature termination of pregnancy by surgical procedure terminates life. By intuition, she maintains that it can also cause great psychological harm to "the woman, the father of the baby, the grandparents, and brothers and sisters involved." It was intuition that drove her actions on August 3, 1991. She did what she thought was right, but it is the law of the land from where the light comes to judge whether or not her actions were justified under law.

To prove her point that the service offered by the corporation on that day terminated life, she offered the testimony of experts. From Paris, France, she called to testify on Dr. Jerome Lejeune. He holds doctorate degrees in medicine and science. He has for the last 40 years divided his time between the practice of medicine and research of human genetics in a teaching environment. His credentials prove that he is at this time recognized by the scientific community as the world's expert in the field of human genetics. Pathology of the chromosome is his particular specialty.

Dr. Lejeune is of the opinion that human beings (homo sapiens) begin life at conception. He gave as reason for his opinion certain scientific facts. A few are set out here. When the ovum donated by the woman is fertilized by the sperm from the man, all ingredients and all instruction necessary to make a human being are therein contained. The new human has a unique genetic organization. The mother is the sole source of shelter and vital fluids for the term of the pregnancy. This need not be the biological mother; any woman's body will do so long as the recipient's body is in the same stage of ovulation as the donor. The new being forms all its own body systems, to include circulatory. It is "a little man in a space capsule," Dr. Lejeune says.

In further support of his opinion, Dr. Lejeune points out that tests done after the fertilized ovum has divided one time shows the protein of the new being is distinct from its progenitors.

The "D.N.A. bar code" - now popular in criminal identification (K.S.A. 1991 Supp. 21-2511) is present after the eighth division from fertilization. At 90 days from fertilization, all systems are fully developed. The fingerprints and palmprints are present and could be taken and recorded at that time. Those will be the same forever. Growth of the new being and its

various organs continue for 25 years after fertilization, the doctor testified.

Dr. Thomas Hilgers was called from Nebraska to give evidence. He is a medical doctor, certified as trained in obstetrics and gynecology. His specialty is reproductive medicine. He has 20 years experience in his profession. He has authored several books and scientific papers of significance in his field.

Dr. Hilgers opines that life for the human being begins at conception. Through his, certain exhibits were brought as evidence, meant to prove his point.

Exhibit D is a video tape made by the witness. It was nine years in production. It depicts scenes meant to demonstrate development of homo sapiens in utero form conception through a few minutes after normal, live birth. Sonogram is the primary tool used for the depiction of Exhibit D. All the subjects where sonography is used are live patients, pregnant at the time. It shows, among other things, considerable embryonic movement before the mother can feel it within her body. It shows fertilization, then heart beat at 16 days following.

The witness says that brain waves have been demonstrated at 42 days after fertilization in humans. His experience is that 12 weeks from fertilization, all normal, well-baby reflexes are present in the new being and at approximately 22 weeks gestational (20 weeks after fertilization) the body of the mother is not necessary for further life of the new human being, given modern medical techniques, Dr. Hilgers explains.

Vincent Montgomery Rue, Ph.D. was called by Mrs. Tilson. His qualification fill 13 pages (Defendant's Exhibit O). He is recognized in his field as one of the world's leading experts on the post-psychological ramifications, diagnosis of mental illness arising there-from and treatment therefore of those persons so affected following the voluntary premature termination

of pregnancy. His patients over the years have included mothers, fathers, siblings and grandparents suffering the symptoms ascribed to a diagnosis of post-traumatic stress disorder (D.S.M. III 309.81 Axis IV (Pg. 26) - Physical Injury or Illness as a Stressor). It follows a feeling of guilt or a sense of loss, Dr. Rue says, both natural occurrences in the psyche of human beings.

From Jackson, Mississippi, Mrs. Tilson called a physician named Beverly McMillan, who specializes in obstetrics-gynecology. She has performed numerous procedures that result in the premature termination of pregnancy. By testimony and demonstrative aids, she explained the four medical procedures used to terminate pregnancy. She testified that each procedure results in termination of life at the time or within minutes of the time of the procedure. According to Mrs. Tilson, the purpose of this evidence is to show the threatened harm she was trying to stop was imminent.

What Mrs. Tilson has proven by her witnesses LeJeune, Hilgers and McMillan is that genetically, histologically, obstetrically, and gynecologically, the scientific community is of opinion that life in homo sapiens begins at conception and continues on for an average life span unless interrupted by trauma or disease.

With witness Rue, Mrs. Tilson proves the scientific community is of opinion that great harm con occur to any number of persons joined in interest following termination of pregnancy other than by natural birth.

This scientific evidence of Mrs. Tilson's demonstrates that the scientific community has proved through research and discovery what Mrs. Tilson believes by intuition.

The City's objection thereto is that this evidence is not relevant to the issue being litigated (K.S.A. 60-401(b)). The City does not contest the truth thereof.

To determine the relevancy of Mrs. Tilson's evidence, as well as the validity of her defense, it is necessary to note the law applicable on August 3, 1991 at the place of occurrence, particularly that pertaining to the issue of whether or not the voluntary premature termination of pregnancy is a wrong or harm with which Mrs. Tilson's defiance can be compared.

The voluntary premature termination of pregnancy was at common law deemed a criminal act. William Blackstone (1723-80) wrote that:

> "To kill a child in its mother's womb is now no murder, but a great misprision..." (W. Blackstone, 4 Commentaries on the Law of England 198).

At 1 Hale's P.C. 429 (cited in *State vs. Harris*, 90 Kan. 807, P.), the law of England in the year 1670 is stated in this way at Page 812:

> "But if a woman be with child and any gives her a potion to destroy the child within her, and she takes it and it works so strongly that it kills her, this is murder ..."

The Kansas Supreme Court in *State vs. Harris* was interpreting a statute that had been the law of Kansas since territory days whereby the legislature made "it a misdemeanor willfully to administer to any pregnant woman any medicine, drug or substance or use any instrument or means with intent thereby to produce abortion or the miscarriage of such woman, unless necessary or medically advised to be necessary to preserve her life," (Terr. Stat. 1855, Ch. 48, Sec. 39; G.S. 1868 Ch. 31, Sec. 44: R.S. 1923 21-437; G.S. 1949 21-437).

Our Supreme Court reasoned in *Harris* that the act of intentionally terminating a pregnancy was one mala in se. In support of such reasoning, other cases were cited within the opinion. Here is a part:

"The act was not only immoral, violative of the law of nature and deliberate in character, but reckless of life and wrongful *per se*" (At Page 814)

"At common law life is not only sacred but it is inalienable. To attempt to produce an abortion or miscarriage, except when necessary to save the life of the mother under advice of medical men, is an unlawful act and has always been regarded as fatal to the child and dangerous to the mother.

It is instructive to note the court's reference to the beginning of life at Page 817:

"The arbitrary refusal of the common law to regard the fetus as alive in such cases until quick was based on no sound physiological principles. Beck makes it plain that the movement recognized by the mother, and which is supposed to prove that her unborn child is alive, is merely one evidence of life, whereas unless life had existed long before the most disastrous consequences to the mother must have already been suffered (1 Beck Medical Jurisprudence 464-467).

Mrs. Tilson's scientific evidence seems to prove what the Supreme Court of Kansas believed in 1913.

The same statutory law interpreted in *Harris, Supra*, became G.S. 1923, 21-437.

Here is the statute defining Kansas state policy:

"Every physician or other person who shall willfully administer to any pregnant woman any medicine, drug or substance whatsoever or shall use or employ any instrument or means whatsoever with intent thereby to procure abortion or the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by a physician to be necessary for that pur-

> pose, shall upon conviction be adjudged guilty of a misdemeanor and punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding five hundred dollars or by both such fine and imprisonment."

The same state policy was codified at G.S. 1949, 21-437.

The Supreme Court of Kansas in 1953 at *Joy vs. Brown* (173 Kan. 823, 252 P.2d 889 @ Page 839) noted that the above statute was one of three enacted:

> "For the purpose of protecting the life not only of the unborn child, but that of the mother ..."

"The state has a vital interest" in both, the court said in the same opinion. The statute was repealed in 1969 (Chap. 180, Page 503, 1969 Ses. Laws of Kansas). July 1, 1970 (Ses. Laws of Kan. 1969, Chap. 180, Sec. 21-3407) is the effective date of the legislative enactment that replaced G.S. 1949 21-437, *Supra*. The replacement statute provided that:

> "(1) Criminal abortion is the purposeful and unjustifiable termination of the pregnancy of any female other than by a live birth. (2) A person licensed to practice medicine and surgery is justified in terminating a pregnancy if he believes there is substantial risk that a continuance of the pregnancy would impair the physical or mental health of the mother or that the child would be born with physical or mental defect, or that the pregnancy resulted from rape, incest or other felonious intercourse; and either; (a) Three persons licensed to practice medicine and surgery, one of whom may be the person performing the abortion, have certified in writing their belief in justifying circumstances, and have filed such certificate prior to the abortion in the hospital licensed by the state board of health and accredited by the joint commission on

> accreditation of hospitals where it is to be performed or in such other place as may be designated by law; or (b) an emergency exists which requires that such abortion be performed immediately in order to preserve the life of the mother. (3) For the purpose of this section pregnancy means that condition of a female from the date of conception to the birth of her child (2) Of this section all illicit intercourse with a female under the age of sixteen (16) years shall be deemed felonious. (5) Criminal abortion is a class D felony."

K.S.A. 65-443 is of interest. It goes to the general policy of the State of Kansas. There it is provided that:

> "No person shall be required to perform or participate in medical procedures which result in the termination of a pregnancy and the refusal of any person to perform or participate in those medical procedures shall not be a basis for civil liability to any person. No hospital, hospital administrator or governing board of any hospital shall terminate the employment of, prevent or impair the practice or occupation of or impose any other sanction on any person because of such person's refusal to perform or participate in the termination."

Another statute illustrative of state policy in the area is K.S.A. 65-2837. That part pertinent here is this:

> "(b) 'unprofessional conduct' means: (5) performing, procuring or aiding and abetting in the performance or procurement of a criminal abortion."

The statute applies to all persons licensed by the State Board of Healing Arts (K.S.A. 65-2812).

In 1972 the United States District Court for the District of Kansas declared (339 F.Supp.986) Section 2(a) of K.S.A. 21-

3407 violative of the equal protection clause of the 14th Amendment to the U.S. Constitution.

It is not necessary to decide here what, if any, ramifications the federal district court's opinion may have had on prosecutions for violation of the statute in Kansas, because in January, 1973, the Supreme Court of the United States handed down *Roe vs. Wade*, *Supra*, and its companion case, *Doe vs. Bolton*, (410 U.S. 959, L.Ed.2d 694, 93 S.Ct. 1410).

Insofar as concerns the resolution of the issue here, the ruling in *Roe* is best summarized by the reporter of decisions at Page 155, Paragraph 3, where it is written that:

> "State criminal abortion laws, like those involved here, that except from criminality only a life-saving procedure on the mother's behalf without regard to the stage of her pregnancy and other interests involved violate the Due Process Clause of the Fourteenth Amendment, which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy. Though the State cannot override that right, it has legitimate interests in protecting both the pregnant woman's health and the potentiality of human life, each of which interests grows and reaches a "compelling" point at various stages of the woman's approach to term. ...(c) For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may if it chooses, regulate and even proscribe, abortion except where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."

Doe, *Supra*, rendered unconstitutional any attempts by the legislature to impose into the decision to terminate a pregnancy the concurrence of physicians or groups other than the pregnant woman's personal physician and herself.

When K.S.A. 21-3407 is viewed in light of *Doe, Supra*, with the guidance of that rule of statutory construction laid down in *State vs. Trudell* (243 Kan. 29, 755 P.2d 511) where, in part, at Syl. 2, the court said that "... a criminal statute, with its punitive effect, must be strictly construed against the state ..." it is clear that the statute is unconstitutional on its face.

The legal history of Kansas teaches that as a matter of public policy, the act of voluntarily terminating a pregnancy prior to term has been considered a wrongful act except when done under strict guidelines. The purpose is to protect the life of the unborn child and the mother (*Joy vs. Brown, Supra*). *Roe, Supra*; and *Doe, Supra*, declared a qualified constitutional right protecting a woman "from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy,: (*Casey vs. Planned Parenthood of Southeastern Penn., et al*, 1992 W.L. 142546, decided June 29, 1992); but left the state government with a legitimate interest in both the woman and the premature life during the entire period of pregnancy (*Roe, Supra*; *Webster vs. Reproductive Health Serv.*, 492 U.S. 490, 106 L.Ed.2d 410, 109 S.Ct. 3040 (1989); *Casey, Supra*; see also *Joy vs. Brown, Supra*).

It may be said that on August 3, 1991, a pregnant woman in the State of Kansas had an unqualified right to undergo a medical procedure meant to terminate her pregnancy at any time prior to term. *Roe vs. Wade, Supra*, and *Doe vs. Bolton, Supra* (1973) rendered K.S.A. 21-3407, Supra, constitutionally void. Perhaps that is why there were no reported cases of prosecution thereunder during the 20 year life of the statute. The legislature took no action during the 18 years following. The Supreme Court of Kansas, during the same time period, did not act on the particular issue but did find that the unborn are not human being at any stage of pregnancy so far as the law of criminal homicide is concerned (*State vs. Green*, 245 Kan. 398; 781 P.2d 678; *State vs. Trudell, Supra*).

Mrs. Tilson says that this unqualified right to terminate a pregnancy at any stage contradicted the state's historical public policy. That is the wrong with which her defiance of the City's criminal trespass ordinance must be compared, she maintains.

In addition to the argument that the woman's right to terminate is not a wrong, the City argues (Tr. brief, *Supra*) that alternatives to law-breaking were available to Mrs. Tilson on that day.

Mrs. Tilson's evidence on that point proves that she had, prior to August 3, 1991, made contact with the legislature, federal and state, by telephone, writing and lobbying. She has protested the government's action in *Roe vs. Wade*, *Supra*, and the Kansas state government's nonaction following. She has peacefully assembled to petition her government for a redress of what she felt to be a grievance. She has exhausted her alternative remedies. The City's point is not well taken.

I will find that the City's evidence (Through Ms. Riggs) meant to show that the corporation's services were sold only to those pregnant women in the first trimester of pregnancy is not credible. The same is disbelieved.

I will find Mrs. Tilson's evidence proffered through witnesses Lejeune, Hilgers, McMillan and Rue relevant to the issue here. The entire evidence of her experts is admitted. The evidence proves that the medical and scientific communities dealing with the subject matter on a daily basis are of opinion that life in homo sapiens begins at conception; and harm is the result of termination of life under most circumstances.

That opinion—as a proposition based on intuition in earlier years—has always been foundation for the public policy in Kansas (*State vs. Harris*, *Supra*; *Joy vs. Brown*, *Supra*).

The City argues (Page 4, above) that *Roe vs. Wade*, *Supra*, declares that the voluntary termination of pregnancy cannot be a harm because it is legal. That is too broad an application.

Neither *Roe vs. Wade, Supra*; its companion case *Doe vs. Bolton, Supra*; nor their progeny (*Webster vs. Reproductive Services et al, Supra*; *Casey vs. Planned Parenthood of Southeastern Penn., Supra*) worked to abrogate the public policy of the State of Kansas that the voluntary act of prematurely terminating a pregnancy without qualifications is a wrongful act. Those federal cases only qualified that policy by constitutionally guaranteeing to each woman in Kansas or elsewhere a "qualified right" (*Roe, Doe, Webster, Casey*) to decide whether to terminate her pregnancy.

The act of termination of pregnancy without qualification, always violative of state policy as mala in se, was not by statute prohibited on August 3, 1991, given the peculiar state of affairs caused by the action of federal government (*Roe vs. Wade*), combined with the inaction of the state government.

The wrongfulness of the act (i.e. unqualified termination of pregnancy) is what must be compared with the wrongfulness of Mrs. Tilson's act of interfering with the right of a corporation and its invitees to engage in lawful business.

The courts in Kansas by tradition have been a place where citizens find a forum at which all with grievances can be heard, their actions measured by proper application of law, under an assurance that right be done and justice administered in every instance.

I will find that the doctrine of justification by necessity is applicable to the facts of this case. The facts of the case must be viewed in light of the law on August 3, 1991.

The doctrine is applied by weighing the two wrongs, while comparing the harm each seeks to avoid. The weighing must be done while balancing constitutionally guaranteed activities associated with these acts. The weighing and balancing must be done in light of the peculiar facts of the individual case.

The legislature of our state has acted since and perhaps in part because of Mrs. Tilson's defiance. It has by House Bill No. 2646 (effective July 1, 1992) reaffirmed the state's policy discussed above by exercising control of and regulating the act of voluntarily terminating a pregnancy prior to live birth. The legislature addressed the situation where citizens might do the same act as Mrs. Tilson did here.

Since Mrs. Tilson's defiance, the Supreme Court of the United States has reaffirmed the constitutional right of a woman to "decide whether to terminate her pregnancy," (*Casey, Supra*) prior to viability of the new life.

Any corporation authorized to do business and its clientele still have a right to do lawful business without interference under the law of this state.

Insofar as concerns the present matter, keeping the tradition that in all matters, right be done and justice administered, Mrs. Tilson's wrongful act done by violating the ordinance (*Supra*) was done to prevent a greater "harm" to society at large than that harm those running the city government for a time sought to prevent by enactment and enforcement of the ordinance.

Mrs. Tilson's wrongful act is forgiven in the eyes of the law under the doctrine of justification by necessity. She is discharged from further responsibility in the case.

The City's ordinance is still the law, even though certain application of it may be subject to interpretation in light of the provisions of H.B. 2646, but that is a subject for another day.

As in all legal matters, this case is decided on the peculiar facts of this particular case. It is not dispositive of any other matter whatsoever.

The length of this opinion can be attributed to the important of the subject matter addressed.

E1

District Court
Eighteenth Judicial District
Sedgwick County Courthouse
Wichita Kansas 67203

Mr. Steve Marsh
Assistant City Attorney
Wichita, Kansas

January 21, 1992

Mr. Steve Graber
Attorney at Law
Hutchinson, Kansas

RE: City of Wichita vs. Elizabeth A. Tilson 91 MC 108

Gentlemen:

The trial of the above-referenced case will proceed in this manner: the City will present evidence. If said evidence is sufficient to stand against a motion for discharge, then I will hear any evidence proffered by the defendant going to any defense known at common law, to include necessity.

It is my understanding that the right to trial by jury will be waived. These are the times I could hear your case: the week of March 9; the week April 20; the week of June 8; or the week of July 27.

The evidence must be concluded at the close of business on the Friday of the week you pick. There are five days to try both sides of the lawsuit.

Please get together to arrive at a date. Thank you.

Sincerely yours,

/s/ _____

Paul W. Clerk
Presiding Judge,
Criminal Department

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

THE CITY OF WICHITA,

Plaintiff,

vs.

ELIZABETH ANN TILSON,

Defendant.

Case No. 91 MC 108

TRANSCRIPT OF PRETRIAL CONFERENCE

PROCEEDINGS had before the Honorable Paul W. Clark, Judge of Division 9 of the District Court of Sedgwick County, Kansas, at Wichita, Kansas on January 14, 1992.

APPEARANCES:

The City of Wichita appeared by its attorney, Mr. Steven Marsh, Assistant City Attorney, Wichita, Kansas.

The Defendant appeared in person and by her attorney, Mr. Steven Graber, Attorney at Law, Hutchinson, Kansas.

THE COURT: Mr. Graber, you represent the defendant?

MR. GRABER: Yes, sir.

THE COURT: You are Elizabeth Tilson?

THE DEFENDANT: Yes, sir.

THE COURT: This case is set for a jury trial on the 3rd day of February.

Now, you lawyers, there's not any question, I don't believe, what the charge is, going to the charge that the City intends to prove up in that trial?

MR. MARSH: Yes, Your Honor, trespassing, I believe.

THE COURT: And city ordinance, you both agree what the ordinance is?

MR. GRABER: Correct, Your Honor.

THE COURT: What is set out?

MR. GRABER: What is sets out.

THE COURT: Ms. Tilson, what's her plea?

MR. GRABER: It's not guilty.

THE COURT: Not guilty and you are requesting a jury trial. It will be a trial of six persons. Everybody agree on that?

MR. MARSH: Yes, sir.

MR. GRABER: Yes, sir.

THE COURT: And does the City have any motions that you need to hear before trial that we can take up today?

MR. MARSH: No, we don't.

THE COURT: On behalf of the defense, Mr. Graber?

MR. GRABER: Yes, Your Honor. Actually, I requested this pretrial conference to move the Court to allow us to put on certain kinds of evidence and specifically we would want to ask the court to allow us to put on evidence of, biological evidence, of when life begins and biological evidence of current embryology transplants with the notion we're asking the Court to make the determination, one, when life begins and, two, at what point in time life has constitutional protection.

The reason for this request is, Your Honor—and I will give as much as the Court wants—we are in the situation here in Wichita, like they have been in Atlanta, New York, Denver, Los Angeles, Portland and now in Billings, Montana, where body politic is in schism because these two questions have been left unanswered by the Supreme Court.

In the *Roe* case, the Court said, we need not decide when life begins. Every constitutional expert, concerning *Rose vs.*

Wade, whether on the pro-life or pro-choice side, decried that statement, saying how can you get around that, you are throwing out Dred Scott.

As the cases have come along, extenuated the notion to where we're hearing, it doesn't matter when life begins, when the First Amendment and constitutional protections attach to a life, abortion is, quote, legal.

This case arises out of the picketing cases of last summer and apart from the pure trespass issue, my client's contention that she was not in fact on private property, there's the additional issue of whether or not, even if the State has evidence to indicate that she was on the property, going on that property to protect a life is justifiable trespass.

It's impossible, our position, I would state to the Court, impossible to reach those issues in this case until the first two issues that I entertained are resolved.

We're not suggesting that the resolutions have a precedent. Our position is until some court takes the stand on that and rules on that, these kinds of experiences that we had in Wichita and they are ongoing now, will not stop and body politic is going to begin to experience those schisms.

Those are the foundational issues. It would not be a waste of the Court's time, even as some project, the court is going to overrule *Rose vs. Wade* and say, we goofed, there is no constitutional right to abortion. Some experts think that will happen in the next few months, meaning less than 12. Then we still have the issue to resolve at the state level and so for those reasons, we would ask the Court to allow us to put on that evidence and if it's the Court's ruling that we cannot put on that evidence, then I would ask the Court in what form or proof would be acceptable to the Court since we have three way statute, how the Court would want us to prepare that to present.

THE COURT: Mr. Marsh, did you wish to respond to Mr. Graber's statement?

MR. MARSH: Your Honor, we do not believe that the Court needs to address that particular issue in this case. What our evidence will show is that the business upon which property we submit the trespass occurred was a legal business under the laws of Kansas as determined by the legislature and that these types of questions that Mr. Graber would ask the Court to decide are essentially issues that should be decided by a legislative body rather than courts and we submit that there is some case law, specifically under the first degree murder statutes, vehicular homicide statutes, that deal with whether or not a fetus can be killed and then there would be some criminal liability and the courts have essentially said it's not a feticide, for lack of a better term, is not illegal and that is a legislative function. The courts do not decide that issue.

We submit that is the position this case is in. This case can be decided without Court deciding those issues.

I believe that where defense is going when it asks the Court to resolve those two first issues is headed toward the defense of necessity and necessity defense, to my knowledge, has not been recognized in this situation in Kansas. At least, I have not been able to find any case law to that effect and case law in other jurisdictions quite simply says that necessity defense does not apply in like situations.

MR. GRABER: May it please the Court. Do I get to respond to this?

THE COURT: Just in a minute. I'll let you respond in just a minute. Let's go back to those areas, perhaps I can narrow down exactly where we're at.

Has the City informed the defense of every witness that you intend to call and have you shown every exhibit that you intend to have at trial, shared it with Mr. Graber?

MR. MARSH: As the Court is aware, this is an appeal case. We have tried this case once before in municipal court. I do not anticipate at this point any additional exhibits or witnesses.

Certainly if some were to come up, I would be happy to let Mr. Graber know of their existence. We do not anticipate anything more.

THE COURT: Nothing that you know of at this time?

MR. MARSH: Right.

THE COURT: I can take judicial notice that City of Wichita has thought to enact this ordinance. We agree what the ordinance says and as to the business that — this is Dr. Tiller's clinic, I guess, we're talking about?

MR. MARSH: This one was not, Your Honor. Memory serves me correctly, it was at a clinic at 3330 East Central. This is not Dr. Tiller's clinic.

THE COURT: This is another clinic. What are we going to prove? This was a business licensed by the State. Mr. Graber, you agree?

MR. GRABER: Yes, Your Honor, we don't have any objection to that.

THE COURT: That then is stipulated to. Well, let me ask you, Mr. Marsh, what else would you intend to prove in the case, assuming all went well, you could prove your case, any other piece of evidence, witness, exhibit, theory that the defense doesn't know about?

MR. MARSH: Not that I can think of, Your Honor. In municipal court, our evidence consisted of a person who was an employee of the clinic and in fact an officer of the corporation that controls the operation and property upon which it sits. That person testified as to the location and the boundary lines of the clinic's property.

The second witness was a police captain who had conversation on that particular day with the clinic employee. The clinic employee asked him to clear the lot, persons were not authorized to be there and then that police supervisor, Detective Mike Watson, made at least two orders to the different groups of people on the property to disburse and then our third witness would be Officer Gary Smith, who in fact made the arrest of Ms. Tilson.

THE COURT: And can identify Ms. Tilson or did over in the City?

MR. MARSH: Yes.

THE COURT: Okay. Mr. Graber, if I understood your statement a minute ago, your client is pleading not guilty to violating the City's ordinance in the first place. You are putting the City of strict proof of that?

MR. GRABER: Yes, Your Honor.

THE COURT: Will you have any witnesses that are, might be called expert under the law that we need to disclose to the City? Just to that point only, talking about property lines and ordinance, that sort of thing?

MR. GRABER: Not on that issue, just the defendant, Ms. Tilson.

THE COURT: Ms. Tilson, she plans to deny that she or she's going to plead not guilty.

MR. GRABER: Pleads not guilty. She will give the Court her location. The issue of whether or not she violated the ordinance —

THE COURT: That would be a jury question, it seems to me, whether or not she violated the law put her in a place where the violation of City ordinance would be a question of fact, it seems to me.

What I know about the case is what you gentlemen have told me today.

Now, back to your, back to your motion to introduce evidence on the other issue that you wish to raise, rather than violation of the City ordinance other than through trespass, I don't know that I know where you are going and I don't want to make you disclose your defense, you don't have a right to do that.

MR. GRABER: I would be glad to disclose it. It's just as I indicated earlier. Many times, and certainly as Mr. Marsh has indicated, many times in many jurisdictions, the issue of necessity of lesser evil, depending on the jurisdiction, as a defense or justification to trespass, has been raised.

I, myself, have prepared briefs for the Oregon Supreme Court, many other Supreme Courts across the country, on that issue. The problem is the legally unresolved issues that we mentioned before. Many times courts say, we can't have a necessity defense or lesser evil defense that goes only to protecting life and they make the quantum leap, abortion is legal so there's no issue and yet we have cases like the one in Tennessee where a husband and wife fought over their frozen embryos, fertilized eggs. Clearly demonstrated that scientifically speaking, a fertilized embryo is not a part of a woman, can be removed, can be transplanted as long as it's placed in another biological animal of the same kind.

The Supreme Court is getting this and there are vibrations that they are going to find that there is no constitutional act of privacy.

Sorry to repeat myself, but since early constitutional law, this is incongruous, there is no right to abortion.

If those issues are resolved, if the Court will hear evidence and resolve when life begins, then a court can say this life

becomes protected, constitutional protections enter into that life at this point.

That has never been decided. Once that's decided, it makes sense to say, no, you can or cannot go on property to save life. If the case is made that life begins and is constitutionally protected at birth, there's no justification for trespass. If, however, the evidence is compelling and says to the Court, I think life is protectable, at least at 24 week gestation, then we have another issue and it would be justifiable to save that life from extermination without its consent.

I'm not unaware of what I'm asking this Court to do, but I'm asking the courts everywhere until I will find someone to do that.

Until those two questions are resolved, this country is going to continue to experience what it's experiencing.

I may not like the resolution of that, research or philosophy may be different how it is determined, but at least it would be a point there is definitiveness and not make our law a void like it is.

Like I indicated earlier, even if the Supreme Court rules that there is no constitutional right to an abortion and it's up to the states, we still have the resolution in Kansas constitution. This is not a waste of time. This is not an exercise in futility.

I can say that given — I'm not sure I can have him here by February 3rd — I could have national experts, even international experts available to the Court to bring this kind of information. I say that in my position as national staff attorney for the Rutherford Institute, an international group of lawyers in Canada, Eastern Europe, England, that we have access to these kinds of people. It's a matter of logistics to get them here.

I'll tell you this: if there are courts who will hear those issues, it is our priority to get them here.

If it relates to this Court, if in fact there were, by the Court's determination, life, there was life, constitutionally protectable life in this abortion clinic on the day in question, would provide another grounds for trespass, should the trespass be proven. It's not an esoteric matter, not unrelated to the case at hand.

In fact, people who do these kind of things, this is the primary reason we do them and people that are pro-choice and oppose this kind of interference would say there's no life, it's a fetus until birth and et cetera. It just hasn't been resolved, Your Honor. Somebody needs to resolve it.

THE COURT: Would you agree the two issues are purely legal?

MR. GRABER: Are purely legal? They are definitely. If the Court agrees to hear these issues, we would never, we would waive jury trial in a heartbeat. It's how important it is to have this resolved.

THE COURT: Mr. Marsh, you wish to surrebuttal?

MR. MARSH: Just quite simply, Your Honor, the issue essentially as to whether or not a fetus is a human being has been resolved by a Kansas court and they have found that it's not specifically for, as I understand, criminal statutes and we would submit then that there is precedent already on this issue in Kansas.

The Court does not need to get into these collateral issues that the defense wishes you to.

THE COURT: Then, Mr. Graber, you wish to add anything?

MR. GRABER: I would just say, Your Honor, that the court hasn't resolved this. The court has said for the purposes of the murder statute. That's the same thing we're seeing in California. People are arrested postpartum for drugs, alcohol during pregnancy. We have this total incongruity that keeps our

body politic in a dither. The reason for that is that these two issues have not been faced and resolved at the constitutional level.

If they did, we wouldn't have one state you can be arrested for smoking cigarettes or drinking alcohol that affects, taking cocaine that affects your baby before it's born. How consistent is that, because the result is to say you better go abort before birth because that's legal. Giving birth to the baby is not and the Court, obviously, can see that's why these things continue to happen.

They may well have said under a murder statute that is not murder. That does not answer the question we're asking the Court to answer.

THE COURT: The issue presented then is will I hear evidence concerning the legal issues just addressed by you lawyers. We seem to all agree it's not a matter to be submitted to a jury. That's not what you are asking.

You agree that it's a legal point. The City's position, as I understand it, is that it's not a proper forum to address that legal issue; it has to be addressed legislatively.

Mr. Graber says where citizens of Kansas can come to raise constitutional issues is the district court, that's the way it was set up in the beginning, where it's suppose to be done, is what those who drafted our constitution thought that they were doing at the time, Mr. Graber indicates.

MR. GRABER: Yes, Your Honor.

THE COURT: What I'm going to do is think about that and look at the — it's been a while since I read cases that have been decided by the Appellate Courts of Kansas regarding the criminal law. In fact, I want to see what they say in the cases but I don't trust my memory to figure out exactly what they say and then I'll make a decision whether or not I ought to hear evidence on the legal point or not.

Let's leave your case set just for control purposes — if I'm going to hear evidence on the matter, obviously on February 3 we'll not hold you to that. I should have a decision on whether or not I'll hear the evidence not later than, not later than Tuesday of next week. I'll tell you one way or the other. If I will hear it, I'll set a date.

If I will hear it, I think we can arrange that because I have this year set aside a week about every six weeks to hear a jury trial instead of administrative things. If I won't, we'll do the case the week of February 3rd or pick a date to hear the case.

Anything that I can do to help either of you today to get ready for your case?

MR. GRABER: All I need to know, basically, once the Court were to decide to hear the evidence, I'll have a lot of administrative work to do.

Up until then, I'll be waiting.

THE COURT: I'll call you all not later than Tuesday, the 21st and tell you. If I am, we'll pick a date when everybody can do it and we'll do it. If not, you'll know that on that date as well.

MR. GRABER: Anything that we can do to assist the Court?

THE COURT: Not at this point. You both set out your positions very well.

MR. GRABER: Thank you.

THE COURT: Thank you very much for your time.

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Direct Testimony of Ann Tilson

DIRECT EXAMINATION

BY MR. GRABER:

Q. Mrs. Tilson, would you state your full legal name for the Court, please?

A. Elizabeth Ann Tilson.

Q. Ms. Tilson, how long have you been involved in the pro-life movement?

A. About six years.

Q. And how did it happen that you became involved?

A. A friend of mine asked me to pray the rosary out in front of one of the abortion clinics.

Q. Approximately six years ago?

A. Yes.

Q. What was your next involvement?

A. My next involvement was through — become a speaker on the speaker's bureau at Life, Inc.

Q. How long did you perform with the speaker's bureau?

A. For about two years.

Q. Now what next did you do after the speaker bureau experience that was germane to the pro-life movement?

A. I did sidewalk counseling.

Q. How long did you do that, sidewalk counseling?

A. About two years.

Q. And then the next involvement you had in pro-life was what?

A. Then the rescues, of course.

Q. Rescues and that brings us pretty much to the time that we are here about, is that correct?

A. Yes.

Q. Let's focus our attention on August the 3rd, 1991. Why did you go to the Wichita Women's Clinic that day?

A. Because I know that they perform abortions there and abortion takes the life of an unborn baby and I wanted to prevent that and I wanted to prevent the detrimental effect that happens to the woman, the father of the baby, the grandparents and brothers and sisters involved.

Q. The word "protest" has been used off and on this morning as a description of what the presence there was intended to be. You've used the word "rescue." Can you differentiate for us why you use the word "rescue?"

A. We were rescuing a human being, another person that we knew was scheduled to die that day.

That's the difference between protest and rescue; we were actually saving their life.

Q. In your mind, you weren't saying don't do your abortion; you were saying you were going to save the baby?

A. Right.

Q. Mrs. Tilson, you indicated that your view of abortion is the taking of a life of an unborn child. What brings you to that conclusion?

A. From literature that I've read. From literature that I've read, both religious and scientific and from an issue of Life Magazine of several years ago that shows conception and the different developmental stages of the baby in the womb and also from the videos that I've seen.

Q. Mrs. Tilson, just to get us back on track, you were talking about rescuing; how did you calculate that your rescue

would actually prevent or would actually, yes, prevent the detrimental effects to the women going in for an abortion?

A. Well, prevent the girls getting in because we were blocking the doors and that would give the sidewalk counselors an opportunity to speak with them.

Q. In your experience, has this approach worked in the past?

A. Yes, it has. There are documented cases of babies that are alive today because of rescues and some of the girls, women, when they see a rescue going on, they will not even attempt to get into an abortion area. They will go home, think about it, change their mind. Also rescues keep abortion in the forefront in the public's eye, doesn't allow it to be hidden away and forgotten and the sidewalk counseling is very effective. Otherwise, the girls, women would not hear the entire truth, the terrible truth of the probable effects of abortion.

Q. The probable effects of abortion meaning what?

A. Well, the abortion clinic does not give them any counseling on the developmental stages of the baby in the womb. It does not give them any counseling on the psychological or emotional problems that develop from having an abortion; gives them insufficient counseling on the physical effects that happen from an abortion and they are not given any counseling on the detrimental effects that happen to the father of the baby, to the grandparents of the baby, to the brothers and sisters, any other people that are involved.

Q. Is this a volunteer thing that you did on August the 3rd?

A. Yes, I did.

Q. In your past six years of being involved in the pro-life movement, have you ever written to authorities raising these same complaints, raising the same issues?

A. Yes, I have.

Q. Would that be a congressman?

A. Yes.

Q. Congress persons?

A. Yes.

Q. State legislators?

A. Yes.

Q. President of the United States?

A. Yes.

Q. Any of these, have you ever made phone calls to these people?

A. Yes.

Q. In ~~all~~ six years, have any of those phone calls or letters ever been effective in rescuing babies?

A. No.

Q. What other alternatives did you feel that you had, if any, on this date?

A. None, except to stop the girls or women that were going into the abortion clinic.

Q. On this day, did you do any damage to any property?

A. No.

Q. Did you speak to any person at the clinic?

A. No.

Q. Did you touch any of the girls that had come for abortions in any way?

A. No.

Q. Do you know whether or not there was, of your own knowledge, whether there were any babies saved that day?

A. Yes, I know of one baby that was.

Q. On August 3rd, you indicated that there was a success. How do you know that?

A. A girl that was scheduled to have an abortion at the clinic that day, went up there, when she saw the rescue going on, she did not go in. One of the counselors talked to her. The very same day she called the Crisis Pregnancy Center, went in there. She went ahead, had the baby and kept the baby and she testified Friday night in front of a huge crowd to this.

Q. What Friday night was this?

A. This past Friday night.

Q. Do you recall her name?

A. Her first name is Tina. I don't recall her last name.

Q. She personally testified to that?

A. Yes.

Q. On August 3rd of 1991, she was turned away by your rescue?

A. Yes.

Direct Examination of Tina McLaughlin

DIRECT EXAMINATION

BY MR. BATAILLON:

Q. Would you please state your full name and address?

A. Tina McLaughlin, 11419 Cindy, Wichita.

Q. And Miss McLaughlin, what is your age, please?

A. 20.

Q. Could you please tell the Court what your educational background is?

A. I graduated from high school, presently a college student.

Q. Where are you enrolled, please?

A. Wichita State.

Q. Miss McLaughlin, I want to take you back to the date of August 3rd, 1991. Do you recall that date?

A. Yes, I do.

Q. Why do you recall that day, please?

A. I was scheduled to have an abortion.

Q. And where were you scheduled to have an abortion at?

A. East Central.

Q. Would that be the Wichita Family Planning Clinic?

A. Yes, it is.

Q. And did you attempt to go in that date for the abortion?

A. Yes, I did.

Q. Could you tell the Court what happened, please?

A. There were rescuers outside the clinic, there were pastors, various other people to keep me from going in. I didn't want to have to go through that, to go through any of those people, so I just went back home.

Q. Were you driving a car yourself?

A. Yes, I was.

Q. And you said that you went home?

A. Yes.

Q. Did you do anything after you went home?

A. I went through the phone book again. I canceled my appointment and then I found a Pregnancy Crisis Center and called them.

Q. When you called the Pregnancy Crisis Center, what kind of counseling were you looking for?

A. Still seeking an abortion.

Q. You thought that was an abortion clinic?

A. Yes.

Q. And what happened when you called them?

A. I had talked to a counselor there that asked me to talk to her, to come in, if I could, and I told her that I needed to have an abortion and she said - Okay. She came to my house and picked me up and I went to her home and we talked about my abortion.

Q. And what did you decide to do?

A. To keep the baby.

Q. Did you have the baby then?

A. Yes, I did.

Q. And is the baby that you gave birth to, the baby that you were going to have an abortion on August 3rd of 1991 at the Wichita Family Planning Clinic, is that the baby in your arms today?

A. Yes, it is.

Q. What's your child's name?

A. Destiny Paige.

Q. Spell that for the court reporter.

A. D-E-S-T-I-N-Y; P-A-I-G-E.

Q. And when was your child born, please?

A. January 9, 1992.

Q. You were about four months pregnant at the time that you were scheduled to have your abortion at the Wichita Planning Family Clinic?

A. Yes, I was.

Direct Examination of Jerome Lejeune, M.D.

DIRECT EXAMINATION

BY MR. GRABER:

Q. Professor, would you give us your full legal name, please?

A. My name is Jerome Lejeune.

Q. And you would spell that please?

A. L-E-J-E-U-N-E. Jerome like Jerome.

Q. Obviously you are not from Wichita, Kansas?

A. I must recognize that. I'm born on the river of the Seine, a little town called Paris, home of my great parents.

Q. Professor, what is your profession or your occupation?

A. I'm an M.D. and Ph.D. My profession is to take care of babies of any age, in uterine, past uterine life if they have difficulties, if their parents have difficulty.

I'm also Ph.D., that is, a doctor in science and genetics, and my duty is to look at the genetic constitution of the children and sometimes of their parents if there is a very special reason in the family and it happens that I discovered the causes of Down's Syndrome 33 years ago and for the first time, we suddenly knew that if there was a mistake in the spelling of the chromosomes of the person, this person was carrying a special disease and that particular case it was Mongolism or Down's Syndrome and now we know different diseases due to different mistakes of the chromosomes and my duty in my lab and consultation is to make a difference and try to help babies as far as the actual stage of medicine allows it.

Q. Is your lab situated in the university setting?

A. Both. We have one that resides at university and inside the hospital which is l'Hospital des Enfants Malades, which was founded before the French Revolution. It's the first

hospital for sick children in the world and still one of the biggest.

Q. How long have you been with this hospital, Professor?

A. Around 20 years now.

Q. When you started with the hospital, where did you practice your profession?

A. In, fact with this hospital, I've been in the hospital since 52. It's very long enough that I've been taking care of babies.

Q. Where did you teach in the United States?

A. California Institute of Technology. At that time there was no course of human genetics at California Institute of Technology and I was invited by Professor Beadle to give the first course in human genetics in Cal-Tech.

That was very strange because at that time I could not speak a word of English. All of my courses were originally in French and at that time I was studying with the dictionary at night and I can tell the students were very kind because they helped me to learn English that way. I hope they learned genetics as well.

Q. When were you at Cal-Tech?

A. At Cal-Tech, it was 58.

Q. You actually did your Ph.D. work on Down's Syndrome?

A. Yes.

Q. I know that you've published different things. Please share with the Court the different publications that you have authored or assisted in authoring.

A. I'm afraid I cannot do that, there are more than 400, it would be very boring, but to give general impression, I started my studies as a geneticist research worker fulltime essentially with the study of the effect of atomic energy on human

chromosomes. I was, for a few years, the French specialist in the United Nations on the effect of atomic energy.

Later I specialized only in pathology in humans and our lab is still a reference laboratory for Europe and sometimes cases coming from the United States just because we were the first one. We were ready to look at pathology of the human chromosomes.

That's the reason I got honor for receiving a few degrees from America. I got the William Allen Memorial medal, which is the most important one you can get in human genetics from the American Society of Human Genetics and I got Kennedy Prize from the late president, a prize which was for discovering research in mental retardation and I got the first Kennedy Prize because, just for it was six months before the assassination of the president.

Q. You mention your association with different academies. What professional associations do you hold? Give some of those, please.

A. In this United States, I'm a member of the American Academy of Arts and Sciences. In various countries, scientific academies of, I think, England, Sweden, Argentina, Chile, of Brazil, and from Germany, well, Italy.

Q. Do you recall the specific areas in which you were qualified to testify?

A. On human genetics and on the nature of the human being.

Q. Have you testified, Dr. Lejeune, in other countries other than in the United States?

A. Yes, but only at the government level like the Senate. I have testified in Australia, in New Zealand, in Austria, and in England, and in France, indeed.

Q. Were these testimonies related to some area of expertise that you hold?

A. They always related to the structure of the genetic embryology and also related to the notion how science can tell what is a thing which is growing. In all the cases it was around that very thing. In some cases it was around the pathology which could happen at the very beginning of life or joined the development of early life.

MR. GRABER: Your Honor, I think we would at this time proffer the Court that Dr. Lejeune is an expert now in the world class level in the area of genetics and human development and ask the Court to so recognize.

THE COURT: Ms. Chalker?

MS. CHALKER: Your Honor, City would again object on the basis it remains our position that this evidence is irrelevant and immaterial. Definition of a human being should be determined by the legislature.

Again it is up to the Court's discretion whether or not you designate this individual as an expert.

THE COURT: You have no fuss then about the expertise of Dr. Lejeune; it's just his evidence has nothing to do with this lawsuit?

MS. CHALKER: That's correct, Your Honor.

THE COURT: Thank you. I'll find then that the witness proffered is expert in the area of human genetics.

MR.GRABER: Thank you, Your Honor.

Q. Dr. Lejeune, you were not here this morning. Testimony was given by Ms. Tilson that on August 3rd of 1991, she went to an abortion clinic to rescue a baby in the womb of a mother because of her understanding that baby was living, she was saving a life.

We have proffered to this Court a defense that requires that kind of activity to be reasonable.

Now, we grant that Ms. Tilson is not a medical expert, but the question is, given your expertise in genetics and the testimony of the abortion clinic staff that they do abortion from up and to 16 months, I'm sorry, 16 weeks after the woman has missed her last period, and the question I ask your opinion on, is whether that would be reasonable to consider that life?

A. The question whether it's reasonable to consider that what is growing inside the womb is a life cannot be disputed. It's obvious and it is certain and beyond any doubt because if it was not, abortion would not be performed at all because nothing would come out, if it was not a life in the beginning.

Then just by the fact that there are abortion clinics, we know that what is growing inside the women is a life. If it was not a life, there would not be abortion. You ask me whether the lady was correct in thinking that what she was doing — which I don't know, I don't know the matter and the whereabouts or what she was doing in front of that clinic — was because she knew that there was a life which was in danger and to the best of my knowledge, I must say that she was right to think like that because we know that life starts at the moment, I mean a new life starts at the moment all of the information necessary and sufficient to distinguish every personality of the new person is gathered inside the same, the same zona pellucida, we call it, which is kind of a plastic bag which is the wall of privacy of the early embryo and inside that sterile wall is one day the information coming from the father carried by the sperm and the accompanying information carried by the by the pronucleus inside the egg.

If they are together at that moment, we know — we teach to every student of every facility of medicine of every country — on this wall a new life is just beginning.

Now, if we look at the recent development of genetics of the last 10 years, I would say — I would say that we know that for life being present, it needs to be there an amount of information, animate matter because there is nothing like living matter. Matter itself cannot live at all; it cannot even be duplicated but it can be animated and that's the subject of the whole science of genetics and embryology is to understand what animates matter so that now this matter is not only that atom and molecule, which it is, but it is, itself, a new life and a new individual.

I would say that 10 years ago, it was difficult to give a full demonstration of that.

It was more an induction, all that we knew about the matter.

But science, since the last five years, for example, it was has been possible to look at this type of information and if I'm not too long, I would present to the Court a very simple phenomenon, that this information inside that tiny egg which is one millimeter and a half in diameter, a little shear thread, the amount of information is wide. There's one molecule of D.N.A., which is a special molecule in which this language is written, and this one matter is coming from the sperm. It's gotten 23 pieces that we call chromosomes.

Also the same matter is coming from the mother. This length of one matter plus one matter gives all the information necessary and sufficient if it is read by machinery which is inside the egg to tell to that matter, you are the one which will be call later Paul or Peter or Margaret and everything is written there so that she\he, embryo, she/he is waiting, the human being, to be given a Christian name nine months later.

And to give you an idea of the minuteness of that language that has arisen, it's so difficult to understand, for example, if we were gathering here in Wichita all of the threads of

every one of the five billions of people who will replace us on this earth, if we were gathering this amount of matter in Wichita, this information would fit neatly inside two aspirin tablets and in those two aspirin tablets would be reason, the quality of each and every one of those five billion people who would replace ourselves on this earth.

That is relevant to the notion to note when does life begin because by the most obvious and the most certain experimental science, we know that a new life begins just at the moment the whole necessary and sufficient information is just right there.

Now, we know from experiments not only on animals but from studying mice, this moment is the moment of fecundation, when the head of the sperm goes inside the zona pellucida.

The reason we know what we know beyond any possible doubt is that studies show fecundation in vitro is feasible and it works.

Now, when you look at the process, the process is to have a neck instead, a vessel, to add a few sperms to that and some of them try to enter the egg, only one succeeds, and if you remove that egg and if you implant it three days later in the womb of her mother, this tiny embryo, she will develop in a human being that she is already and that is not speculation because in vitro fertilization is used, 10,000 of children are born, I think in this country, more than 10,000, with those techniques and it cannot be doubted that their life has been seen to begin under a microscope at the moment the whole information was gathered and this whole information was there at the moment of conception which is demonstrated in our species by penetration of a sperm.

Now, this is not a surprise because if we go back to the most common wisdom which is common language, common language has always known that. It's not by a mistake that we use the same word to define an idea coming into our own mind as of a baby coming to life. In both cases we speak about conception.

A baby is conceived and we conceive an idea and that is, I would say, a guide to the scientist, the common language is found since Medieval times, that the beginning of life, spirit and matter, information and its substraits are so meshed into the — interwoven, we use the same word to talk about the conception of the baby, conception of an idea.

And it's solely when the whole definition of the concepts are presented in our mind that we can say that we have this particular idea. And just the same way, just at the moment that all of those elements of life, chromosomes are present and dictate the future of that very person, that life of this new person is beginning.

Q. Doctor, you've mentioned that there is a specific point in time when this information joins and you gave it your scientific name. What was that name?

A. We call it fecundation or fertilization. I'm not entirely sure of the right one in English. In French the right one is fecundation, but I think to better say fertilization around here and general definition is conception and so to speak the entry of the sperm which is fertilization, per se, is the mechanism of it. Now, the beginning of the life is the conception because the moment at which what will come into matter, the information which would come into matter, is there.

Q. You also indicated when this information joins, it has a scientific nomenclature of D.N.A. Why is that significant?

A. Excuse me, Your Honor, I will try not to be to boring, but I have to be more cumbersome, nevertheless.

We knew since now around three years, scientists have made a discovery in this country and in England — in this country by Holiday and Swain and in England made by Surani — that conception is more complicated than we were believing and teaching it five years ago.

Because five years ago, we were believing, five years ago we were teaching to our students that when you get a gene from your father, it was just as important as when you got it from your mother. They can be different; father can give you your blue eyes and mother gray eyes or the contrary; but so to speak of the same, besides, to make up your own makeup.

But we know now that nature is more precise than that and nature has a trick, so to speak, to underline the message in a masculine way which is carried by the sperm and to underline it in a feminine way which is carried by the ovum.

All the women underlines the same sequences of the message; all the men underlines the same sequences of the message. But the sequences underlined by the man is not the same as the one underlined by the women.

That was an enormous surprise. It gives much bigger amount of information, just the addition of the two halves, but what was not only bewilderment, but I would say a feeling of gratefulness to nature was when scientists demonstrated what was doing this differentiation.

If only the amount of information coming from the father was present, everything underlined on the male way, there would be no human being. There would be life and the same would divide; it would make vesicles and finally some flesh looking placenta. Nothing itself, no human.

Conversely, if at the very beginning, there was not a true conception, a true fertilization, but was a mistake so that only the chromosomes underlying on the mother's way were there, what would occur, for example in a virgin who has some sudden growth of one of the ovums or ovary and it makes what we call a dermoid cyst inside of the ovary. It grows; it's life and this life is human, but no baby.

What is peculiar, inside that tumor, you can find teeth, skin, hairs, some nerves. That is, so to speak, spare parts, but no baby. Nobody is there; only a bunch of spare parts.

And we know that we need, to be conceived, that not only the whole human, so to speak, information which is in every cell that we have is there, that is needed, but besides we need the information managed at the father's way and the information managed the mother's way are simultaneously there and we know that this simultaneous encounter of those two kinds of underlying information occur only at the moment of fertilization, if fertilization is normal.

That is, Your Honor, long, but it's necessary to understand that now we can really make a difference between life of human cells which would grow like a tumor, the two tumors that I was talking about, and life of a new human being who would grow as a human being that she/he is already and as I said, I kind of have a feeling of gratefulness to nature to explain so simply in this tiny little sphere of one millimeter and a half the fertilization on the wall that we see much later in life, what is underlined by the father is a trick of the trade to build a shelter, to go out and find the food, build the membrane that would protect the baby and to be the placenta in which the baby will get the food and what is taught to the new one by the mother is the way how to build himself and it's remembering what we see in the ordinary life, that normally bringing in the food, build-

ing the house, is the father's duty, but incubation of the baby, it's always under the mother who can do that.

Q. Once this information has joined and it's begun fertilization or the fertilization process is complete, if I understand your testimony, and the new human being is formed, if uninterrupted, what will be the results or the result of the growth of this newly formed human being?

A. Well, if it is interrupted, it would not be an interruption of pregnancy, but it would be an interruption of life. There's a very remarkable beginning in our life that we're not like the egg of a chicken that you can just have the egg and put some heating system around and the chicken will do the whole job.

We are, in fact, a little similar to a chicken in the sense we do hatch but we do hatch when we are very young.

I spoke about this plastic bag, this zona pellucida, and inside was first the female nucleus and the female pronucleus and the sperm; now the fertilization occurs. It divides into two cells; some of them divided where there's three cells — phenomenon which is very important. For technical reasons, I will touch upon — but later it goes to four, to eight, to 16, and at that moment, the cells are still inside the ball of plastic.

At the time, they contract themselves so that only three of them are inside the certain areas and that moment the three which are inside get an information we cannot decipher yet but we know that those three cells inside would produce a body of an individual and the cells around them will produce at the present time the kind of a space capsule, the space time capsule which will allow this tiny astronaut to survive.

But now the space capsule is very small. But it continues another division and when you get to 32, it has to hatch

because the plastic cannot increase and then one cell secretes a special enzyme which spins a very tiny hole in the bag and the tiny bag, it looks like it's trying to go through that hole and goes out and buries herself inside the episiliem of the uterus and that is very needed because the reserves are very small.

The egg of a chicken is very big compared to a human egg which is very small so we have not, so to speak, acquired all of the food supply we need. So we need to keep them together, and the person who gave us survival possibility is the mother and her body.

For a long time it has been a surprise that the early embryo has such a fatality, that it can survive even outside the womb. Sometimes it happens that instead of being fecundated, fertilized inside the tube which is a conduit between the ovary and the uterus, sometimes it falls down in the uterine cavity. If it can hunker itself to the abdomen, the baby will grow itself.

It's very rare but two years ago there was an extrauterine pregnancy, an abdominal pregnancy. One went to term in Canada and the baby went to eight months and then it was delivered by laparotomy, an operation, because it could not find the way out because it was not in the uterus, but inside the abdomen and the baby is normal.

That proves that even the womb is not absolutely necessary. What is absolutely necessary is a shelter and nurture. As far as we can tell, for the moment it's only the mother's organism which can provide us with that shelter and that nature.

But, this demonstration by pathology that an embryo can survive even outside of the womb if it is inside the body of her mother. That's proof that it's own life is totally dif-

ferent than the life of a mother, but the mother is, so to speak, the cosmic vessel that it needs.

I would say, at the beginning the tiny wall in the inside it's bag and later in the amnion that it builds around himself is like a tiny astronaut, but the same with a true astronaut going outside the shuttle to walk in the sky, he needs the food and protection and the vital fluids coming from the vessel, from the mother vessel or the mothership, but the shuttle is not building the astronaut, just the same way as a tiny astronaut inside it's own space capsule that it has made by itself is not made by the mother.

He's protected by the mother. All of the life supplies are given to him by the mother organism, but it's not the mother who built him. He is building himself.

Just the same that we are not allowed to say that the astronaut in the womb would die if we removed his capsule, we cannot say the astronaut is not viable then if we were allowed to open the capsule in the womb. No, nature would never do that and I think that doctors should be as wise as an engineer of NASA that is not depriving the human being in its space capsule from the vital fluid that he needs.

Q. Doctor, once this process of development begins, is there ever a time when the developing baby can not be transplanted from the womb in which it's being nurtured?

A. Two things about that. The first thing is that the very early human being inside his plastic bag before he has hatched, can be transplanted without difficulty. This little baby is one millimeter and a half, fecundated, immediately on, very tiny tube of plastic with a drop of liquid and then she can be transferred inside the womb of her mother but more precisely, she can be transferred to the womb of any women who's at the right time, inside her so that transfer of an

embryo from in vitro fertilization inside his mother or inside a foster mother has been made.

But even a conception in utero has been made, a lot of strides have been made in that a baby has been conceived inside the womb of his own mother and conceive inside the womb, we say conceive inside the tube and then the tube moves very slowly in four or five days inside the womb. It was not considered a womb, it's considered a tube. In that case it was, the baby was conceived by normal intercourse between the man and his wife and the tube was washed out, the baby, the tiny baby was aspirated out and injected in the womb of another mother or another would-be mother who is not the biological mother but the uterine mother of this baby and this baby has survived.

Then we have the proof that transplantation even from the body of their mother inside which she has been conceived is possible inside the womb of another woman who will give him the food and nurture as a very early adoptive mother but there is not yet but in the very near future another possibility of transplantation.

If I speak about that, Your Honor, I have to be clear that I'm speaking about development that has not yet been made, but the fundamentals of them have been demonstrated around a few months ago. It was in the French Academy of Medicine and one of our correspondents coming from Belgium, Dr. Foidart, gave the last of his research and he found a very surprising phenomenon that probably is not yet known in the United States because it has been discovered in Belgium, in Louvain and he found —

And he found that contrary to what's written in every book, handbook, textbook, that when the little baby buries itself inside the womb, then it produces what is called villa, villas, which are like tentacles of a sea animal and around

that villa makes boundary by one sheath of cells only through which the liquid the serum, more precise, plasma of the mother is just diffusing and the discovery that Foidart made was that the blood of the mother does not irrigate inside that sheath in which the baby is taking the food out of the fluid, but that this process is just by diffusion of the plasma.

So that since that discovery, which has been definitely described this year, we know now that implantation is not to be compared to the placenta to placenta implantation because during the first two months, the early human being is really inside the mucoso but no blood of the mother is circulation inside what will become later the placenta, it's just diffusion and it means that if it was very carefully removed with its surrounding exudate similar to the one which happens in nature, he would survive entirely outside the mother's body and could be transferred, for example, if he has been conceived inside the tube, instead of being killed because we remove the tube which if it erupts, the mother will die, baby will die, instead of doing that, we could very precautiously take it out, the baby, and transfer the baby inside the womb of its own mother.

This discovery of Foidart has changed our mind and when I heard it around four months ago, I was extremely interested because it is in contradiction to which is written in all of the textbooks. His demonstration was so strong that everybody in that academy recognized that it was a landmark of the development of the human being.

Now, coming back to your question, whether the life of the new person is really, so to speak, a part of the life of the mother, is not exactly correct. This new life can live at least up to the third month in utero, up to the time that the baby is sucking her thumb, without communication with the blood of the mother inside the placenta.

That means that the autonomy of the early, early life is much bigger than we were believing for and I would honestly recognize that one year ago I would not have spoken those words because I didn't know it. I was not teaching that to my students, but now that I have seen the result of that discovery, I am quite confident that in a few years, those transfers of the early human being will be possible. They are proving that he/she does not belong to a given body, he/she belongs to herself.

Now, what I speak about, the time in which the blood of the mother is not circulating in the placenta, I'm speaking between one to three months.

Now, the stage of development that we are talking about is a tiny fellow, the size of my thumb, two months of age. The whole development is sufficient so that anybody having ever seen a tiny human being would, with no mistake, make a difference between a human and a chimpanzee. Nobody can make a mistake.

The tiny human being would fit in my fist and you would not see that I have something in my hand, but if I was to open my hand, you would see the head, the arms, the legs. You would see the sex and if you were having a good magnifier, you would see the fingerprints and acknowledge beginning of the lenses are already there.

If you were a fortunate teller, you would take good advantage of it. If you were a policeman, you would take the identity of the person by the print and those prints will not change for the 80 or 90 years that she will possibly live later.

Then when I speak about the importance of the discovery of Foidart, that is, without being really any relation to the mother's blood, only the exudate, that we know that we

were exceedingly human by the first week, but we knew it in the beginning of time with our thumb.

For the geneticist, I mean it's not, again, a mistake or a chance that all of the civilizations have always been interested in a fairy tale which has always enchanted all of the children and which has been told by all the mothers and grandmothers of any language of this earth, the fairy tale of Tom Thumb, which is really a time in which the human being is a tiny fellow who would fit in a nutshell.

It's really happening that we live in an underground world in which some marvelous things happen to very tiny human beings and if this tale can be told to all of the children of the world and has been told by all of the mothers of the world, it is because it is a true story. But is was only in the past demonstrated by this extraordinary feeling that the woman has of the truth of this phenomenon was known. Now we know it by experimental means and suddenly what was suppose to be a fairy tale, it just is very alive but true, entirely.

Q. Professor, you continue to use the word human being?

A. Yes.

Q. That characterization, if I understand your testimony, forgive me if I'm not able to talk science, you talk in terms of human being?

A. Yes.

Q. Characterizing the baby in the womb?

A. Yes

Q. Why do you use the term human being?

A. Because I know of the terms; because for all that we know in genetics and when I was talking, it's a baby. It's not a thing; it's a human being. It's by its own venture that it grows and defines itself; he\she is a human being.

We know that by history of the intercourse, that this baby is coming from two human persons but, for instance, we know that the D.N.A., the sperm, the D.N.A. that was in the egg is a human egg; it's not a chimpanzee egg. We know that this being is a human being.

You cannot be human and be a being without being a human being. That's a reason why I use that word because it's a noncommittal word; it's a straight forward description of what we know.

Now, a human being can be defined very simply. A human being is a member of our species. A chimpanzee being is a member of the chimpanzee species and that that's the same for every species and if I tell you very simply my feeling that when I see some of my colleagues, very learned persons, discussing between themselves whether in the beginning, the thin was not a kind of animal, I must confess that I'm surprised because having visited another place than the university which is equally interesting and in which you learn equally well, the zoological garden, the zoo, and in the zoo I have never seen a congress of chimpanzees asking themselves whether they are children when they will be grown up, will they become professors of universities.

The difference being between the two species, which are the closest that we have evidence of, the chimp does not take himself as a human being.

Now, how it is possible that in a learned population like our own, where we know so much about the beginning of life of every species, to be entirely possible some people question themselves, whether up to a given stage this life is not a human being, honestly, I believe that is because they are fearful of the laws and because they suppose, if I agree with which I see, that this being is human and there

is a human being, I will be obligated to say, what amount of respect is owed to a human being.

But that is not my point of view as a geneticist. A geneticist cannot tell you that a human being should be respected. It can tell you that human being is a member of the human species; that we can tell you. Now, whether you respect all the members of the human species, that is a social decision. You can declare and treat this type of human being with no respect — That's if I have been accepted to testify in your court, Your Honor, it's because it's not only that I feel that tiny one, which is growing inside the womb, is a human being, but it's because I know it. It's because if I was not teaching that to my students, I would not teach them modern science.

Maybe 15 years ago some people could doubt in some place, but now with what we know about the information of the matter about the specificity of mankind compared to its closest cousin, which is a chimpanzee, we're obligated to say, to recognize after fertilization, after conception that this tiny being, sheath, is already a human being, is not a fertilization opinion, is not a metaphysic contention. It is a fact of plain experimental evidence.

I feel that we respect human beings because we recognize that all of us are carriers of the same gift which is the extraordinary pedigree which gives us our thinking and that the chimpanzees do not have and when I see the picture of a baby in the womb, I know that the motto of this baby is, if you let me live, I will affect life. That is the destiny of human beings and I guess it's for that reason that all of the civilizations in society recognize that all of the, beyond all differences, beyond all inequitity in our achievement, all of us should be respected because we are the same species, human being.

That's true from the beginning, he is human being. That's true from the beginning.

Q. I believe your testimony, Dr. Lejeune, you have referred to enzymes, protozoa, those kinds of things. Molecularly speaking, we can distinguish a human being, as you were referring to, while it is in the womb?

A. It is rather easy and very technologically difficult, but easy to understand how we can do that. It was discovered around four or five years ago by English gentleman named Jeffries —

They found that they can, with a special probe, recognize part of the genetic makeup of a person. Technology is complicated, but result is very obvious; it looks very much like the bar code that we have in a supermarket. That is different bands of different widths are differently spaced and this bar code is specific for its human being.

The code recognizes every person in this room. By puncture, with a drop of blood, by increasing technology, it is able to recognize that specific bar code in one cell taken from an early embryo of eight cells.

This has been done in England and we know then — that without exception — from that system, that every human being is unique and irreplaceable.

Now we see another thing; that if we have this bar code not only of the embryo but of both parents, mother and father, we can recognize the events which are coming which have been received by embryo from the mother and the events which have been received from the father and if there has been a mistake, then if the father is not the biological father, we can detect it and we can now in forensic medicine use that to demonstrate who is the biological father of this very person.

The fact that we can now know it inside one cell demonstrates beyond any doubt that we can demonstrate at the level of the molecule that embryo has a genetic constitution which is personal to her and which is not identical to the constitution of her mother.

More, it has been detected that, for example — I have to be technical — it's the science of genetics that tells us that the heat shock molecule, which is a molecule that will produce when the heat is too high, can be detected on the ovum and, therefore, those molecules are typically maternal, they have the shape of the maternal molecule when they have divided into two cells, the first step of the life of this new person. We can detect, again, heat shock producing, it's not inhuman, two stage, only the maternal protein, it's the protein of the embryo herself. That is we can recognize what has come through that embryo from father and from mother.

Then even at the molecular level today, we can demonstrate that the early human being is not a part of a body of the mother, but there is there some body and this body is the body of a new human being different from any other already existing.

Q. Doctor Lejeune, you use the term "each human being is unique and irreplaceable." What do you mean by irreplaceable? Are you suggesting this is the only time in human existence this human individual can exist?

A. Exactly what I mean, in the sense we know that a number of combinations between the genes are that high and just to take the example of the bar code that I was speaking of differentiating very tiny amount of biogenetic makeup, one in a million of a part, just looking at that we already see that there is no other human being now living who would have exactly the same bar code. But that is true for all of the rest of our constitution.

That is the reason why brothers and sisters of the same family, coming from the same father and the same mother, can be told apart. You see that they have in common genes which are specific of their families that you recognize them. The reason why we can recognize every individual now living on this earth is because each of them has its own personal constitution, personal constellation of genes.

Then when I say each individual is irreplaceable, it's because this particular individual which has been conceived is some person, so to speak, that no other one will later exactly reproduce what he was.

Just as we cannot say that when we see a person, we can kill that person, replace him by another person. The other person would not replace the one that had disappeared. Just the same on any human conception, everyone is irreplaceable.

Q. Doctor, I venture that most of us in the room are layman, not geneticists.

A. Yes.

Q. And there is very broad information up here. Can you give us in layman's terms, sort of a summary of the certainty of what you are saying? How can we readily identify with what you are saying?

A. I try to give the general impression by relying upon the known history of Tom Thumb and that is common to everyone and everyone can understand the existence of very tiny human beings. But if I had to try to convince people who could not have ever seen an early human being, I would tell them that what I now am demonstrating has been demonstrated very, very long age by nature and to do that, I will take an example.

In the southeastern hemisphere, there are big bipeds and they abort their babies at two months of age; kangaroos.

Their uteruses are too small. After two months, the tiny kangaroo is expelled by an abortion. The kangaroo is a foreign one - the king kangaroo is just the size of a human being and the tiny one, when she's expelled, measures two centimeters and a half, the Tom Thumb I am talking about. But curiously, does not look like a tiny kangaroo. It looks like a little sausage.

Q. A little what?

A. Sausage. Very tiny limbs, very tiny and little claw and it can jump vertically very far. It does not know that its mother has a pouch, but it knows to reach for the pouch, fall inside and take a tiny nipple and after seven months, it will grow inside the pouch. Now the phenomenon, what is extraordinary, the mother kangaroo is not a brilliant animal, but nevertheless it recognizes that tiny sausage as a tiny kangaroo. It forbids to any other animal to jump into the pouch and to take the teeters.

Then, if nature has taken the trouble, so to speak, to wire inside the meager brain of a mother kangaroo that this tiny kangaroo, aborted, is real, is a kangarooess, so to speak, this poor female does recognize, I cannot believe that we human beings, with one liter and a half brain, are not able to recognize the humanness of the tiny —

Q. Professor, please answer any questions that the prosecutor may have for you.

THE COURT: Cross-examination?

MS. CHALKER: City has no cross-examination of this witness.

Direct Testimony of Thomas W. Hilgers, M.D.

DIRECT EXAMINATION

BY MR. BATAILLON:

Q. Dr. Hilgers, would you please state your full name and address?

A. My name is Thomas William Hilgers, 1331 North 131st, Omaha, Nebraska.

Q. What is your profession, please?

A. I'm a physician practicing in obstetrics and gynecology with a specialty in reproductive medicine.

Q. Are you a duly licensed doctor?

A. I am.

Q. Where are licensed, please?

A. In the State of Nebraska.

Q. How long have you been so licensed?

A. Approximately 15 years.

Q. And Doctor, how long have you practiced medicine?

A. I graduated from medical school in 1969 and I've been practicing in one way or another since then.

Q. Doctor, could you tell the Court about your educational background?

A. I went to St. John's University in College Hills, Minnesota, where I graduated in 1965; Minnesota Medical School, where I graduated with a medical degree in 1969. I spent one year at Rochester General Hospital in Rochester, Minnesota in a rotating internship, leaving in 1970.

I spent three years at the Mayo Graduate School of Medicine as a fellow in obstetrics and gynecology; one year also at Medical College of Ohio in Toledo in obstetrics and

gynecology and that completed my formal training in obstetrics and gynecology.

Q. Can you tell the Court, please, what is obstetrics and gynecology?

A. Well, obstetrics, that is that branch of medicine that deals with pregnancy and normal pregnancy events as well as any complications regarding pregnancy, delivery of the baby, taking care of the mother during the entire course of the pregnancy and so forth.

Q. Doctor, have you had any other training since your residency?

A. I've been involved in a variety of postgraduate, clinical, educational programs in various areas relating specifically to my specialty and especially development and microsurgical courses, laser courses, etc.

Q. Expand on that a little bit for the Court, what these other courses have been.

A. Postgraduate training programs that train physicians in a particular technique. These two cases that I mentioned, it involved microsurgical techniques and also the use of gynecological laser instruments.

Q. Doctor, what is your date of birth, please?

A. August 9 of 1943.

Q. Doctor, do you practice in any type of specialty now?

A. Yes, my specialty is limited almost entirely now to reproduction medicine.

Q. And what is reproduction medicine, please?

A. Well, reproduction medicine is that field of medicine where we are dealing with patients who have problems with their reproductive system, if you will, which includes high risk pregnancy on one hand and complicated preconceptional

problems on the other hand, infertility, miscarriages, stillbirths, prematurity and so forth.

Q. Tell the Court a little bit about your practice in Omaha, what type of office and setup you have there.

A. I work at the National Center for the Treatment of Reproductive Disorders, which I am the director. It is a division of the Pope Paul VI Institute for the Study of Human Reproduction. This institute has a patient care area where we see our patients.

It also has or houses the National Reproductive Hormone Laboratory, which is a laboratory dealing to measure the whole gamut of reproductive hormones.

We have the National Reproductive Ultrasound Center. Those examinations are conducted on women who are pregnant and also other examinations of the reproduction system itself.

Q. How long have you been the director there, Doctor?

A. Six and a half years.

Q. And how large is your staff?

A. We have about 40 employees, roughly.

Q. And what is the purpose of this institute?

A. Well, it's an educational service and research institution which provides, its primary role at the present time is provision of services both on a local and national basis to women who suffer from reproduction disorders of one kind or another.

We're also very much involved in research, having been involved particularly in aspects of reproduction that cause abnormalities, conditions relating to ovulation disorders, conditions relating to endometriosis, pelvic adhesions, the whole variety of things which are related to things that cause problems in human reproduction.

Q. Have you made any publications on any of this research, Doctor?

A. We have, we publish on different aspects of our research.

Q. What different aspects have you been published on?

A. Well, I have published probably over 13 or 14 books in my career and over 50 articles that deal with the whole gamut of reproduction problems and related issues.

Q. Are you a member of any medical associations, Doctor?

A. Yes, I am. First of all, board certified by the American Board of Obstetrics and Gynecology and also the American Board of Laser Surgery and I belong to the American College of Obstetrics and Gynecologists, the American Fertility Society, the Society of Reproductive Surgeons, the Society of Fallopius International and the American Society of Laser in Medicine and Surgery.

Q. Are you staff doctor on any hospitals?

A. Yes, I'm on the staff of Bergan Mercy Medical Center in Omaha, Nebraska and also St. Joseph Hospital in Omaha.

Q. Doctor, as part of your education and studies and research, have you studied the human development in the womb?

A. I have.

Q. How have you been able to study that, please?

A. You study in a variety of ways; formal courses, of course, in medical school, courses on embryology and as one advances in medical education, specifically postgraduate education, you get what we call clinical experience dealing with people who are indeed pregnant or those women attempting to achieve a pregnancy and following through the successful accomplishments of that goal and following that through the birth of the child.

That also involved practical reading of various textbooks related specifically to prenatal birth and development and in our own and more specifically with my own association and directorship with our reproduction ultrasound center, for the last 12 or 13 years we've been involved in an in-depth study of the ultrasound parameters of the prenatal role in development.

Q. Doctor, could you please explain to the Court what ultrasound is?

A. Ultrasound is a technology, not a brand new technology, I might point out, a refining technology, if I might define it as such, in which sound waves are injected into the body. This is done with a transfuser which doesn't really inject in the usual way like a hypodermic needle might but it does push the sound waves toward the body or into the body.

This transfuser is also capable of hearing the echo of those sound waves as it bounces against different types of tissues.

About one percent of the time this transfuser is pushing sound waves into the body and about 99 percent of the time just listening for the echo.

Now that echo is then interpreted by sophisticated equipment which allows for those echoes to be developed into a picture of sorts.

Years ago we could only get sort of a hard copy, if you will, of a stationary standing photograph. Now we are able to get real time motion picture footage of anything really that we're trying to study with ultrasound.

A. You'll have to excuse my artistry. I'm not a great artist but this is the basic female reproduction system with this organ here being the uterus. And coming off the uterus on both sides are the fallopian tubes.

At the very end of the fallopian tubes are very delicate structures that are called fimbria. These are finger-like projections which are designed to pick up the ovum, the egg, when it's released form the ovary.

The ovary flanks the fallopian tubes on both sides. There are two fallopian tubes and two ovaries. Follicle which contains the egg grows and develops toward maturity over a period of four or five days during each menstrual cycle; there's an egg inside of that follicle. Once it reaches maturity, it ruptures and this egg is released.

That is called ovulation and then that egg is picked up by the fimbria and it goes down the fallopian tube.

Q. Fimbria, are they finger-like projections?

A. Very delicate kind of pink structures that are sort of feather-like almost and there in this picture. The whole role of the fimbria is to pick up the egg from the ovary at the time of ovulation.

This is the cervix down here, which is the openings into the uterus and this is the uterine cavity and down here are the walls of the vagina.

So in human reproduction, very simply, the sperm are deposited here at the time of intercourse at the openings of the uterus at the cervical openings and then several hundred, usually, of these sperm make their way up to the fallopian tube where they, the outer portion of the fallopian tube, sort of wait for the egg to arrive and at that point conception occurs in the fallopian tube.

Q. What I'm going to ask you, Doctor, is to describe for the Court the reproductive system prior to conception and then I'm going to ask you some questions regarding conception and how the child develops after conception. Have you provided anything for the Court to review in that regard?

A. As a part of the research that I've done over these last 10 or 12 years and our interest in the growth of the development of the unborn child, we have consolidated our findings into a video tape which describes those events that lead up to the moment of conception and then also describes visually those events from the moment of conception all the way up through the birth of the child.

Q. Would this assist you in your testimony to the Court today?

A. It would. It's invaluable in terms of being able to explain what we observe every day in our practice.

Q. Dr. Hilgers, I'm handing you what the court reporter has marked as exhibit D. Do you recognize that?

A. Yes, I do. It's a tape called Visual Encounter With The Unborn, which is just the name we've given to the tape.

Q. Could you tell the Court, please, how that tape came to be?

A. Could you be a little more specific?

Q. Did you produce that tape?

A. Yes, I did produce this tape. The research that has gone into the development of the components of this tape began in 1981 and this was culminated in 1990, as we pulled together all of the efforts of the research at that time — as I pulled together, as I was primary investigator of this.

Q. Were you the person responsible for the production of this tape?

A. I was not only the person responsible for the production but also the person that took the pictures that are in this tape.

Q. Doctor, we have set up here a V.C.R. system and I'm going to insert the tape into the V.C.R. and you will, you will have access to the remote control unit of the V.C.R.

A. Okay.

Q. Dr. Hilgers, the first portion, could you tell the Court, please, exactly just in a synopsis what the Court will be seeing throughout this tape, just so the Judge has somewhat of a road map what you are showing?

A. Right. The tape, the very first portion of it, just shows some of the techniques that we use to collect information that is presented in the body of the tape.

The second portion of the tape covers those events that occur prior to human conception and the third part of the tape, which is the longest part of the tape, takes the events from the time of conception all the way through the birth of the child.

Q. Now, Doctor, what, in this photograph that we have here, what is occurring?

A. One of the techniques that we used extensively in the development of this, the use of scopes that we use is an endoscope. An endoscope is an instrument which is inserted into a body cavity and this particular instrument right here is a laparoscope. This is a lens, which the eyepieces have been located at this point, and the physician can look, look down the eyepiece all the way out to the tip and out the tip and you can see a light which will allow the cavity to be lit up so that one can actually see inside the cavity.

This is a light cord over here that is attaching to the surgical instrument.

Q. And you have a laser monitor, the red dot, that you are utilizing?

A. I do. It's convenient to be able to point things out.

Q. Doctor, what do you do with that instrument then?

A. Well, I think this will show it. This is, this is an instrument called a trocar, which is a sleeve-like instrument which has been inserted into the woman's abdomen, done by very

small incision below her belly button, and the laparoscope, this instrument here, is inserted into the sleeve so that a physician in this position can look around.

In this particular picture, the patient is tilted significantly, almost upside down, which would be the patient's head here out of sight.

Q. On the bottom left?

A. Bottom left and her feet in the upper right. This is the abdomen and right here is the insertion of the instrument into the abdominal cavity. It's just under the belly button. Another small instrument is inserted just above the public bone which allows for us to move things around, look at the ovary, the bowel and so forth.

Q. The last instrument that you described inserted just above the pubic bone is the instrument that the doctor has in his left hand and appears in right hand portion of the screen, is that correct?

A. That's correct.

Q. What is the physician seeing here?

A. This is an example what we would be seeing. This is that lower instrument that I showed you just a minute ago. This is the probe; this is her ovary which in this case is showing a corpus luteum Corpus luteum is the portion of the ovary that forms medically after ovulation and it's Latin for yellowish texture to it.

The dark spot is the place where the egg was released, stigma of the ovary where the egg was released at the time of ovulation.

This is one of the ultrasound photographs, just by example of trying to communicate ultrasound images. This series of white and dark shadows is the computer-interpreted photograph which comes from the interpretation of the

echoes which are coming as a result of the ultrasound interpretation.

Q. You are referring to the frame — I am referring to the upper right hand corner — on 9-9-90 at approximately — or May 22, 1990. Is that kind of your logo?

A. The ultrasound equipment is designed to indicate and time the event of the examination and that happens to be the date and time of this examination.

Q. And, Doctor, if you could, please really try to refer to those numbers to correspond your testimony with exactly what we are seeing.

A. This is an ultrasound machine that we have in our institution. It is a top of the line, Diasonic S.P.A. 400, real time ultrasound unit, and this is the operator, at least one of our operators, a Registered Diagnostic Medical Sonographer.

Q. Is sonography very similar to what we refer, I guess, it's sonar that was used for example by destroyers locating submarines, submarines finding their way underwater?

A. In principle, it's the same technology or the same principles that are involved. The thing that has changed over many, many years now has been the sophistication of the ultrasound equipment and especially in the development of the computerization and the software programs that are necessary to interpret the data.

So, what we're seeing today certainly was not available 50 years ago in World War II or any other time. This is an advancing technology. We are now able to — this is absolutely the state of the line right now. It was when we completed this three years ago or two years ago, I guess, but now we're able to do color pictures, picturing, with ultrasound and we do have that equipment at our institute and there are some research tools now using ultrasound, actually give third dimensional pictures.

Q. Doctor, what do we have now?

A. This is a laproscopic photograph taken at the time of the procedure I described earlier of the internal reproductive organs. The uterus is this muscular organ shaped like a pear and it's about the same size. On the left, the left fallopian tube and the right, the fallopian tube and the fallopian tubes are also flanking the uterus on both sides.

Q. And have a description on the film there?

A. Yes, these are labeled. We're following the fallopian tube down to the very ends and this is fimbria, at the end of the fallopian tube. The finger-like ends are not obvious in this view but obvious later.

You can see the close proximity of the tubes to the ovaries so they can pick up the egg at the time of ovulation.

This is ultrasound showing the same photograph. In this case, the ultrasound was taken with a bladder full and this circular black area is the bladder that serves as kind of a window in order to see the uterus and ovary on the side.

This is a more closeup view of the ovary. In this case this entire shadow here is the ovary and the little dark center is small follicle just beginning to develop on the ovary.

Q. Doctor, what I'm asking for you to explain for us, please, the inner workings of the reproductive system.

A. Let me go back a second partially. We are now using an instrument which is called a hysteroscope.

A hysteroscope is another one of the endoscopes that I mentioned earlier. In this case the scope is allowed to look inside the uterus and in this particular view we're actually looking down the cervical canal which is at the very beginning of the openings to the uterus and as the instrument slides into the uterine cavity which is the entire uterine

cavity with the internal openings of the fallopian tubes entering the ovary at this point and at this point.

Q. At this point and this point you are referring to the dark area?

A. Yeah, this would be at about 6:00 o'clock; this probably at about 2:00 o'clock.

Q. The other one is the fallopian tube, the dark area?

A. And this is a closeup view of the fallopian tube itself. Now we have moved the scope much closer to the internal openings of the tube. This is really quite small in real life, only one or two millimeters in diameter, but this is the channel from the uterus now that would move up the fallopian tube towards the ovary and there are small little air bubbles that are going because we take these pictures through a fluid environment and those air bubbles take the same path that the sperm would take as they go up to the fallopian tubes.

This is the ovary just as it's about ready to ovulate. This is a developing, mature follicle which reaches about one inch in diameter. It's a cystic structure on the ovary, about an inch from here to there and at the time of ovulation it ruptures and releases the egg.

And the fallopian tube is right next to the ovary and this picture we can see the fimbria a little better, although they are more dramatic than that even.

Q. Is the fallopian tube attached to the ovary, Doctor?

A. It is attached to the ovary to some extent at its very ends. It's also quite free from the ovary. This is, this particular photograph shows us the capability of ultrasound to see interior to the ovary.

This is a mature follicle which is a cyst that is present to the ovary and this little half moon shaped structure right

here is called the cumulus oophorus. It's a shadow of cells that surrounds the ovum or the egg. We can't actually see the egg on ultrasound; you can see the cumulus.

We happen, as a research interest of ours, spend a great deal of time on abnormalities of the cumulus. That's why we are able to sort of pinpoint it.

Q. We are still referring to the cumulus oophorus?

A. Yes, this is the cumulus oophorus inside the follicle. Now, this again through a laparoscope we're looking at the ovary just as it is about ready to ovulate.

This is the follicle as it is emerging, as the ovum is emerging and this sort of structure protruding from the superior pole or upper pole of the ovary is the follicle that contains the ovum.

This next sequence is an ultrasound examination, to my knowledge has never been photographed before. It's the actual event of ovulation or rupture of the follicle.

This is the follicle identified on ultrasound and as we move forward with it, you'll see this follicle collapse. It will happen just about now. There it goes. It is now collapsed and ruptured and at that point, the material inside the follicle has been released; ovulation has occurred.

Q. And now the egg has been expelled out, is that correct, Doctor?

A. That's correct. The egg is expelled out. These are the fimbria as they look, where they are floating in the water and they have this finger-like, kind of feather-like projections on them.

As the egg is released from the ovary, these fimbria are designed to pick up the ovum or the egg from the ovary to begin its journey down the fallopian tube.

This particular photograph now is being taken with a salpingscope.

Each of these scopes are simply more smaller than the other and this one is small enough to enter the internal diameter of the fallopian tube.

We're actually looking down the barrel of the fallopian tube here and this is the same, same course the sperm take and about there, the ovum would meet the sperm and that's at the point where conception occurs.

Q. Doctor, what we're seeing now on the pictures, what is that, please?

A. This is an ovum. This large cell.

Q. Circular?

A. This round, yeah, basically spherical cell is the ovum and it's surrounded by sperm which can be seen in this particular photograph as the sperm tails moving very vigorously.

Usually about 100 to 150 sperm will surround the ovum in much the same fashion as is shown in this particular photograph.

You can see this particular sperm penetrate, just did it, penetrated into the cytoplasm of the ovum and at that point, the union of the genetic material from the father, which is represented by the sperm, and the genetic material which is in the ovum, a new human life is created.

Q. Does only one sperm enter the egg, Doctor?

A. Yes. The ovum is surrounded by a layer, which I'm pointing out here. Kind of grayish layer right now on the side of the spherical portion of the ovum, which is called the zona pellucida.

The zona pellucida is almost like a shell. Although it's not hard as an egg shell, for example, but it has as its primary

goal the closing off of the ovum to any additional sperm after the first sperm enters.

So once this sperm enters into the cytoplasm or cellular material of the ovum, then this zona pellucida shuts down. It's like a barrier; kind of locks the ovum, and no more sperm can enter.

It has pretty important function.

Now there are times that goes abnormal. As a result of that, abnormalities will develop, but that's not common. It's one of the most important protective mediums in reproduction physiology.

Here we're looking at this fertilization or conception sequence. Here's the dome of the ovum. This is the lone sperm that is going to make its way into the ovum and we see it enter there.

Q. And, Doctor, when this occurs, what is this known as?

A. This is known as either fertilization or conception and it is, biologically speaking, the point where human life begins, individual human life begins.

Q. Doctor, does the, what does the sperm contain and what does the ovum contain?

A. The sperm contains 23 chromosomes from the father. The ovum contains 23 chromosomes form the mother.

When the sperm enters the ovum, again seen in this particular sequence, the nuclear material from the father joins that of the mother and new human being with 2 — 46, sorry, 46 chromosomes is created and those chromosomes will be the same for the rest of that individual's life and they are a unique fingerprint, almost, of that individual's existence.

The newer conditions of D.N.A. typing, for example, would allow for very, very careful and specific identifica-

tion of that individual because of those 46 chromosomes and genetic material contained in this.

Q. This is a new human being, unique from other human beings?

A. Yes, this human being is the only one of its kind ever.

Q. This is the only time this human being will ever have the opportunity to live and grow?

A. That is correct.

Q. Doctor, what is the movie that you show at this time, the picture?

A. Well, this is following conception now. The ovary has released the egg from this particular portion of the ovary and this is the corpus luteum, which I referred to earlier.

The corpus luteum is the yellow body which produces the hormone progesterone and progesterone is the key hormone to supporting the lining of the uterus so the pregnancy can be maintained and continued forward.

Q. Doctor, what happens to the sperm that does not impregnate the ovum?

A. The natural course of the sperm that does not impregnate the ovum is to die within a few days.

Q. What about the ovum that is not impregnated?

A. The nonimpregnated ovum has the same fate; however it dies more quickly, usually 16 to 18 hours after it's released.

Q. Is there any type of hormone change with regard to the mother after ovulation?

A. Yes. In fact, these hormones, progesterone and estrogen, particularly, are especially important to the maintenance of the pregnancy.

There are other hormones, though. One which is called H.C.T.; human chorionic gonadotrophin.

Q. Doctor, once there is conception, what do you refer to the new being as, term you describe this beginning stage of life?

A. Well, from a practical point of view, we can identify conception about 15 or 16 days after it occurs, at which time we do a pregnancy test and the pregnancy test we do is by measuring this human chorionic gonadotrophin hormone and when patients call us for the results of that, we usually say, "You are going to have a baby."

Q. Doctor, is the new human baby dependent upon the mother for anything?

A. Yes.

Q. Tell the Court what the dependency is.

A. Well, the new baby is dependent on the mother for a lot of things. Obviously oxygen, nutritional elements, a place to stay, all of those things that are natural to the nurturing of the unborn at this point in life.

Q. Is the new baby self-generating?

A. Yes, the growth and development of the baby itself is under direct control of the child. It must have support, as we must all have those.

Q. Doctor, we next have, the frame says five weeks gestation. What is that please?

A. Well, in our way of speaking, obstetrically, when we refer to how far pregnant someone is we measure it from the last day of the last menstrual period.

That has been the standard for a long time. The reason for that is because menstruation is an obvious and somewhat dramatic event; women remember when it occurs and they can usually identify the first day when it begins.

So, pregnancy can be indicated from that point. However, ovulation doesn't occur until about two weeks later.

When we talk about five week gestational age, we are talking about three weeks old from conception. There's always a two week discrepancy, what we call gestation age and fetal age. But gestational age is the commonly used term, when we talk about gestational age.

Q. All of these been referred to as gestational age?

A. It will always be gestational age.

Q. Fetal age would be two weeks less than that?

A. That's correct.

Q. If we have a gestational age of five weeks, the child would actually be three weeks old, approximately?

A. That's correct.

Q. Doctor, would you continue with your development here?

A. At five weeks of age we're able to see in this particular photograph the bladder again located here. This is the uterine muscle, sort of pear-shaped uterus and inside the uterus is the gestational sac, which also contains the early embryonic pole we can already see at three weeks after conception.

Q. You are referring to the photograph 9 January, approximately 9 hours, 43 minutes?

A. That's correct. Ultrasound, incidentally, allows us to measure these weeks of gestation very, very careful, as well. There isn't much guess how far pregnant this women is.

Next sequence is a twin pregnancy. We can see the uterus as well as two gestational sacs. We call this the lone ranger sign. This is a five week triple pregnancy. We can see, we can see if I can get it stopped here. We can see three gestational sacs.

In this case, the bladder is up here. Again the uterus is circumferential around and there's one, two, three gestational sacs.

Q. Did all of those human beings survive that?

A. They did and they are all doing well at this point.

This is just slightly further, about three days further down and this particular photograph is designed to show the heart beat in this embryo at about 24 days following conception and the embryo is identified with the arrow. When one concentrates on this area, they can see the babies heartbeat at this point in time.

Q. This is March 19 at approximately 8:39?

A. Yes, it's quite obvious in this particular photograph; you can see rhythmic beating of the baby's heart.

Q. When does the heartbeat of the baby begin, Doctor?

A. It starts at about 16 days after —

Q. After?

A. After conception. This photograph is the same embryo and we've taken an electronic cursor, we've put it through the baby's heart and with that we can actually get a visual representation of the heartbeat which comes out on this particular diagram as we enlarge it, these small blips that are located here, little whitish, rhythmical blips are markings almost like a electrocardiogram would be except it's using ultrasound of the baby's heartbeat at 5.5 weeks.

Q. Doctor, where are the heartbeats again?

A. The heartbeats are located on this particular tracings about in the middle portion of the photograph. Arrow's pointing to them; small white dots rhythmically, much like electrocardiogram except showing ultrasonography.

Q. What is the relationship of the child's, as opposed to the mother?

A. The mother's is about half the baby's or the baby's is about twice of the mother's. Just about, not quite.

This is at 6.8 weeks gestation age and the heartbeat inside the embryo can be easily identified at this point. More easily, I should say.

Electronic cursor is again placed through the baby's heart and the tracing becomes that much more obvious because the strength of the heart beating is increasing.

Q. We're referring to the picture of March 21, 1500 hours 29 minutes, I guess?

A. Yes.

Q. You have an arrow there depicting where each of the heartbeats are?

A. Here the sonographer is making clear where the heartbeats are shown.

Q. Doctor, all we've seen so far, does it accurately, fairly depict what is going on in the womb as the child develops?

A. It does.

Q. Doctor, what do we have here now?

A. This is a photograph that I took of an embryo at seven weeks gestation age and this is the baby's heart beating and the rhythmical fashion and about approximately 100 beats per minute.

Q. And this is at seven weeks?

A. That was at seven weeks, yes, and this is at 7.1 weeks, using ultrasound, you can see the heartbeat very clearly.

The yolk sac is also clear. The yolk sac is one of the early nutritional components for the early embryo, providing nutrition for the early embryo.

Q. This is March, photograph or picture is March 29 at approximately 1134?

A. That's correct.

Q. Doctor, can you tell the Court what an embryo, what do you mean when you are saying embryo here? What is that?

A. An embryo medically speaking is classified as from the moment of conception to the eighth weeks of gestation age. From the ninth week on, it's called a fetus. Those are medical terms applied to this stage of human development.

Q. What does the word embryo mean? Is there a definition to it? What is the derivative of embryo? Where does it come from?

A. You know, I just have a blank on that. I knew that at one time, but I don't have it. It's a Greek derivative, I know that.

Q. Young one?

A. Well, fetus means young one, offspring.

Q. I'll ask you that later on. Is this what we're seeing here, Doctor, is the embryo, a human being?

A. Yes.

Q. Doctor, do you have an opinion, based upon a reasonable degree of medical certainty, as to whether or not this embryo that you have showed us here is a human being?

A. I do.

Q. And what is that opinion?

A. I think this is a human being. I deliver human beings day in and day out in my medical practice and this is just one of those human beings at an earlier stage in its development.

Q. Doctor, would you continue, please, with the growth?

A. We are using the cursor again to measure. This is one of the ways we measure the embryo and date the pregnancy. This is a picture of an embryo that was at 7.6 weeks as the pregnancy now continues to advance and one can see the frontal lobes of the brain identified fairly clearly in this particular photograph. The baby's eye. The limb buds coming off the upper arm. This is the left arm. On the left arm you can see the developing thumb and fingers.

The reddened tissue is actually where the heart is located in this particular photograph. It's a little lower than the adult position of the heart and the umbilical cord is coming off. Feet and legs are down here.

Q. Doctor, could you point out where the child's eyes are at this time?

A These are the eyes.

Q. Can you see the brain forming?

A. Yes, these are the frontal lobes here of the brain that are forming.

Q. And this child would be approximately 5.6 weeks?

A. 5.6 weeks from conception; 7.6 gestation age.

Q. Go on, Doctor, now show us how the child develops?

A. This is the same embryo photographed in a slightly different position where the thumb and the fingers can be quite easily identified and the upper arm.

Q. The embryo that we're seeing here, this child is not alive, is it?

A. No this particular embryo is not alive.

Q. This is outside the womb?

A. This is outside the womb, correct.

Q. What is the next photograph?

A. We are now at 8.3 weeks. We can see some of the body of the embryo, the heart beating in the center.

Q. This is on October 6?

A. Yeah. We can also see some of the developing brain too at this point, which coincides with the previous photograph.

Q. How come sometimes the embryo is shaded, where the brain is a dark area?

A. Well, anything that is fluid filled appears as dark shades. So this is the gestational sac and the fluid, of course, surrounding the baby does not absorb echoes very well or sound, it transfers right through and you got a black image.

The brain at this stage of development has a fair amount of fluid in this, this stage. This stage it shows up as a fluid that will grow as the baby develops.

These are the arm buds coming off; the head over on the right hand side of the photograph.

This photograph shows the developing spine also at 8.3 weeks. These parallel lines that we can see on this particular photograph is the baby's back and it shows the developing spine at this stage of development.

Q. Doctor, with the development of the spine, when are there brain waves that are active in the fetus?

A. Brain waves have been identified as early as 42 days after conception. That ultrasound photograph coincides with this particular observation where you can actually see a very well involved beginning spinal cord outlined by the yellow arrows at 8.3 weeks, as well.

Q. Doctor, if we can stop, go back at 7.3 weeks you had the ultrasound on one of the children. How are, how have the organs developed on that child?

A. By about the 7th week, all of the organs are present that are necessary for survival in life. Really until, well, after 22 years of life there's ongoing group maturity of those organs, but they are all present by the 7th week in utero.

Q. How old would the human being be when they are formed, completed their formation?

A. Seven weeks.

Q. I mean completed the entire growth they are going to have?

A. You mean a maturation, maturing and everything?

Q. Yes.

A. In the early 20s usually. There is continuing maturing of the various organs up to the 20, 22 years of age.

Q. Continue, Doctor, with your discussion here with regard to the fetus at 8.3 weeks. What are we seeing here, Doctor?

A. This again is the heartbeat with the cursor going through the heartbeat showing the tracing, the periodic rhythmical tracing of the heartbeat which has become easy for most people to see at this point.

Q. That is October 6 picture?

A. Correct.

Q Doctor, could you go back a little bit, please, show us where the heart is beating on the photograph, on the movie?

A. This is — here's the heart beating right here.

Q. 8.3 weeks. Doctor, with the development of the brain, what other activities and body function does the fetus have?

A. The baby is now beginning to be able to respond to stimuli, outside stimuli. There is a significant thought that they can feel pain at this point because of the well-developed spinal cord system which is already intact and present.

This particular sequence, we see the amniotic sac and gestational sac of the baby at about 8.1 weeks in which we can see the hand really well-developed at this point already. The baby's brow, nose and the lips and chin and the eye and actually the primitive ear is also able to be seen at this point.

Q. When is the child's development the most extensive?

A. Do you mean — I'm not sure — what do you mean by that?

Q. What stage of the development inside the utero is the development of the child most rapid?

A. Well, the most dramatic is clearly in the first seven weeks, which is really five weeks following conception. Very dramatic things happen between the time of conception and all of the organogenesis, organogenesis meaning the structure development of the organs — then from this point, it's nurturing and growing in utero or out of utero. It's not limited to inuterine experience.

Q. Does the fetus respond to touch?

A. Yes.

Q. At 8.3 weeks?

A. Yes, it will respond a little bit better in a little bit, but it's starting to begin to respond to touch at this point. This is at 9.3 weeks. This is an umbilical cord pulsating and here you will see spontaneous body movement. This embryo will be able to respond to outside touch.

Q. Is the child now a fetus or still an embryo?

A. This is a fetus.

Q. Could you describe for us what, where the body parts are of that child?

A. Okay. This is the umbilical cord. Now, this is the baby's head, upper right arm. This is the right arm; left arm. the

right leg bud and left leg and torso or the main body of the baby.

Q. Is it possible to see the heart beating here?

A. Yes, if you focus right in the chest area, you'll be able to see rhythmic contractions. That photograph was designed to reveal heartbeat.

This is 12 weeks. At 12 weeks the fetus is very capable of doing a lot of things, curl its toe, respond to external stimuli. If the fluid is sweetened, it will drink faster. If it's made bitter, it will not drink so much. It will grasp it fists.

I've had a baby in my hands where it exhibited perfect Moro reflex and grasp reflex, which are standard newborn reflexes which we look for when we are examining the health of newborn babies.

Q. Referring to photographs at 12 and a half weeks which are also of the date of February 27, is that correct?

A. That's correct. In this case, this is the baby's head. This is the brow. He's got his — he or she has got his or her fists up to the brow. This is the baby's eye here. Again bottom of the baby.

This is another picture of the spine. You see it just keeps developing further and further; just a little bit more advanced now at 12 and a half weeks.

Here's the baby's foot. At 12 and a half weeks, one can pretty easily see the heel of the foot, the lower portion of the leg. The ball of the foot, the lower portion of the leg. The ball of the foot and the different toes.

There is an interesting, from a scientific point of view, an interesting science called comparative anatomy.

Comparative anatomy is a science in which you can look at different anatomic features from different species, a chimpanzee, a cow, or a horse or human and just by looking

at the anatomic features, one can tell it's a horse or a cow or a human, whatever, and the foot happens to be one of those really classic features, as is the hand, really classic features of the human and the characteristics of the heel of the foot and the protruding foreportion of the foot is unique to human existence. No other species has that.

So, actually by looking at this and understanding comparative anatomy, one can say this is a human being as well.

Q. What is the next?

A. We're now at 14.6 weeks and this shows the hand and the fingers and thumb coming off of the hand.

Q. This is October 26?

A. 26. Now, this particular — it's the same age. Ultrasound is so capable, that we're able to, we're able to identify the long bones in the arm.

This is the humerus. And this is the radius and the ulna, the two major bones in the forearm. You can also see the metatarsal, which are the major bones in the hands, very clearly seen in ultrasound in growth and development.

Q. This child that we're seeing is 12.6 weeks of fetal age?

A. From conception, that's correct, and 14.6 weeks gestational. Here we can see the shadow outline of the lungs and liver. They have two different consistencies to them. One can easily distinguish them by ultrasound.

At 15 weeks of age, this is probably one of the more incredible pictures from my point of view, at least we can see by ultrasound. This is the baby's head. Again these are the forebrain structures here. The right here, this very sharply circular structure right there is the lens of the eye. Very characteristic anatomical feature that we can see on ultrasound because of the anatomic features of the lens

which is a fluid-filled cavity, small one, might be, one can see it sharply outlined by ultrasound.

Q. This is October 28 photo?

A. That's correct.

Q. Now which age?

A. Now, we're at 16 weeks. We can see the whole profile of the baby. This is the head, torso. Here's the heart beating, upper leg, lower leg and foot.

Here we can even see four chambers in the baby's heart, if I can stop action. There's one, two, three, four. Two ventricles and two atriums.

We're at 16 weeks still. Again, the baby's head. This is a sequence which shows the baby's fingers and thumb moving in concert almost as if, like he's playing the trumpet and the baby's lips are right there.

Q. Doctor, the movement that we saw of the child there, were those spontaneous movements of the child?

A. Yes, those are entirely spontaneous. That's a point, incidentally, where the mother probably is not yet feeling the baby move.

Let me go back. This is at 16 weeks. Most pregnant women won't feel the baby moving yet. There will be a few who will feel it at 16 weeks, but the average is 20 weeks.

So, all of the movement that you've seen so far, the mother is unable to detect.

Here at 17 weeks, you can see the continued development of the spinal cord. Here we're seeing the bony prominences of the cord. You can see the small notches, though, that attached the vertebrae and rib structure.

Here at 18.9 weeks, this is one of the legs coming out. Here the legs, leg, and here the scrotum and penis coming off. We can identify the sex of the baby at this early stage.

This is the twin pregnancy of 19 weeks. You have one of the baby's on the right side; one on the left side.

Q. Are these spontaneous movements of the child?

A. Yes, these are entirely spontaneous.

Q. This is on February, is it, 9?

A. February 9, that's correct. Now, here again, some of the comparative anatomy in this case of the left foot. This is the lower leg; here's the heel. Here's the large toe and the one, two, three, four smaller toes.

Q. Our next sequence is what, Doctor?

A. We're at 23.5 weeks in this sequence. The baby's head is here, and the mouth is actually opened right here. So what you are seeing is an open mouth and body of the baby is here, extremities coming down here.

The focus of the ultrasound here is on the mouth being opened and the protruding of the baby's tongue and swallowing motion.

Here is the mouth open. There's actually the tongue here. You'll see it coming out in one of the sequences, is a big yawn. There's the tongue right there, right there.

Q. This is October 25?

A. Let me go back. I didn't catch the date on it. This is October 25, that's correct. There's the tongue.

Q. The next sequence is 25 and a half week child, Doctor?

A. Yeah, this is 25 and a half weeks. This shows the profile, brow, baby's nose, the lips and chin.

29.3 weeks, we can see again the four chamber heart with its continued rhythmical beating, 44 beats a minute. The electric cursor is placed, we can see obvious tracing.

Because the baby is much more older, we can see a lot of structures by ultrasound. This is the stomach. That makes it a very good diagnostic tool we use frequently all the time. This is an artery, inferior vena cava, the baby's bladder.

Q. These are all of the baby?

A. Are they what?

Q. The picture of the artery and the bladder, that was a baby?

A. Oh, yeah, all of that, that stage of development, 29.3 weeks. We can see them earlier than this actually. It's very helpful to be able to identify these anatomical features as we monitor the pregnancy.

This is breathing motion, 34 weeks. The breathing motion occurs previous to this but this is the lung; it's moving up and down. This is the heart over here. Pulsating in a standard mode. This is at 34 weeks. You can see the baby's foot, big toe, four smaller toes pretty easily.

Q. Next sequence, 35 weeks?

A. At 35 weeks you can see the tongue protruding again. These are the labia of a female infant, the two major lips surrounding the vagina. So the sex of the female infant can also be determined.

This particular ultrasound examination shows this baby with its eyes, nose, lips and chin and the fist of his, one of his arms, I think the right, probably.

Q. Doctor, is this child just about to come out from inside the mothers womb?

A. That's correct, that's right. This actual sequence right here was taken the day before this baby was born and the next

sequence is the actual birth of that baby. So, this sequence and this baby are the same.

Q. What is going on now, Doctor?

A. This is obstetrician-gynecologist delivering the baby seen in the previous photograph. This happened to be cesarean delivery and this is being taken at 8:46 a.m. in the morning and in a moment, you'll see this baby being removed from its in utero environment to its extrauterine environment outside.

Q. Doctor, as we're seeing the baby now, is that the way the baby looked when it was inside the mother's womb?

A. Identical except it was darker.

Q. Is there anything magical about the birthing event with regard to the child as to whether it's a human or not?

A. Well, the thing that is impressive, once the umbilical cord is clamped, this baby has innate ability to take on its own, breathing functions, and exist for that moment, at least outside the mother's womb. But as far as the individual is concerned, it's clearly the same individual. There is just no question about it.

I am — I've worked in this field a long time. I've worked with a lot of other people that worked in this field. It would be pure folly for me to say it's not the same individual that started at the time of conception.

Q. This is basically just checking the baby after the birth?

A. Yes, pediatrician is taking the baby and giving it a little bit a oxygen through this green tube.

Q. Is this a human being?

A. Yes.

Q. Dr. Hilgers, have you ever had occasion to handle an unborn child or a child outside the womb at a very young age, much earlier than birth?

A. Yes, I have on a number of occasions.

Q. And could you tell the Court a little bit about some of those occasions?

A. I referred earlier in my testimony to a situation in which I had a small child in my hands at about the 14th week following the last menstrual period.

This baby, delivered significantly prematurely, obviously, because of its age, was not capable of prolonged sustaining of life outside the mother's womb. But, in my hands, this baby was fully consistent with being human; the heart was beating; the baby was taking breaths; respiratory activity was going on.

As I held the baby in my hands, I was able to lift the baby slightly off of my hand and just let it fall in the same way we do a Moro reflex.

Moro reflex is a very standard reflex done on newborn infants. You take the two hands of the baby two inches off and drop them. When you drop them, they throw the arms and legs out. It's a startle reflex called Moro reflex, often thought to be a reflex of newborn infants. But at 14 weeks of age, this baby had a very well-developed Moro reflex.

Also putting my hand into this baby's hand or my finger and simulating this baby's grasp reflex, another reflex that we use for testing the newborn infant, this baby had a perfectly well-developed grasp reflex. Able to grasp my finger; her very small hand; my finger very large compared to this baby's hands; still had all of the integrity of a grasp reflex present.

All of the parts were there; all of the fingers and toes; all the things that we normally judge a newborn infant by.

It was a very dramatic event in my life, one which is very, very convincing of what we see and this is a baby. Of course, we don't normally do this because it's in utero at a stage when the mother doesn't normally feel movement, only see that by ultrasound, but we've been able to do this for 15 years, see these, unseen event occur.

So what I've shown in ultrasound and observed what I have seen in this baby are very consistent and, of course, I've seen a variety of other babies at earlier stages and later stages of development, as well.

Q. Doctor, you said this baby was 14 weeks. Is it 14 week gestational?

A. That was 14 weeks gestational.

Q. So the baby would have been approximately 12 weeks fetal age?

A. That's correct.

Q. Doctor, how large was this baby, how big was the baby?

A. This baby fit in the palm of my hand. The crown which is the upper portion of the head, the top of the head to the rump, extended from below my index finger to just below the palm of my hand, the heel of my hand.

Q. Doctor, you have opined that, based upon a reasonable degree of medical certainty, that human life begins at conception.

Q. You gave your opinion based upon a reasonable degree of medical certainty, is that correct, Doctor —

A. Yes.

Q. Are you more certain than beyond a reasonable degree of medical certainty as to the, as to the life begins, human life begins at conception?

A. I've been studying the growth or the development of the unborn human child since I was a medical student in 64 and 65 when I took my first embryology course. I took courses in embryology as a medical student in the late 60s; studied obstetrics four years and now practiced for almost 20 years after conclusion of my residency program.

Part of my practice has been to study this process and to do research into the origins of the human person, human being and all of the observations that I've attempted to make are based on scientific principles and scientific facts based upon principles of scientific investigation and there is absolutely no question that human life begins at the moment when those two join, the sperm and the egg join, and the process that we call human conception.

Q. Doctor, all of the films that you saw here of the unborn child as it developed, was that, in your opinion, was that child a human being throughout the entire time, even before birth?

A. Yes, the answer is that it is a human being. What else can it be?

Q. (By Mr. Bataillon) Doctor, I'm handing you what the court reporter has marked as Exhibit M. Do you recognize that, Doctor, that exhibit?

A. It's an elephant.

Q. And what type of elephant is that, Doctor?

A.

It would be a preborn elephant.

Q. How can you tell that, Doctor?

A. Well, the size of this particular elephant. An elephant is very small, only maybe two or three times the size of the hand which is attached to it. There's an umbilical cord coming off of its abdomen; it's attached to a rather large placenta.

Q. Doctor, can this elephant grow up to be a human being?

A. No, sir, it cannot.

Q. Can a human being, can human sperm that unites with the human ovum at conception, can that develop anything other than a human being?

A. No, it cannot.

Q. Doctor, do you understand what the term, medical term viability means?

A. I do.

Q. What is that, Doctor?

A. Viability means the capability of living.

Q. Is the human being at conception capable of living?

A. The answer to that question is yes.

Q. Is there viability of that?

A. The answer is yes.

Q. And do they classify viability as in utero or inside the uterus?

A. First of all, viability is a term that means the capability of living. That's the overall definition of that term. It has become associated mostly with a form of viability that is associated with the ability of the baby to be able to live outside the mother's womb.

That type of viability is referred to as extracorporeal viability. Extracorporeal means outside the body.

From the time of conception, up until the time of extracorporeal viability, the fetus and embryo are still viable and we refer to that as endocorporeal viability at that stage.

Q. Doctor, are you familiar with what an abortion is?

A. I am.

Q. How are you familiar with that?

A. Well, I'm familiar with it mostly through my reading and observation of films and study of the abortion question, which I have done rather extensively over many years. The actual procedures are common procedures which all obstetricians and gynecologists are familiar.

Q. Doctor, does an abortion terminate life of this human being in utero?

A. To my knowledge, there are no abortions performed where it is not the intent to kill the human being either in utero or out of the utero. It is true, however, there have been survivors of the abortion procedure. Those survivors are few in number, but they have occurred.

Q. How old is the child that can possibly survive outside the womb after an abortion?

A. That's not a particularly easy question to answer because it would deal with what sort of medical resources are available in the community and a variety of other things, but babies have been able to live extracorporeally, if you will, 22 weeks after conception. That's 22 week gestational age. I don't want to confuse you.

Q. In a, if a child in utero is being aborted at approximately the 14th to 16th week of gestational age, would that child have an opportunity or chance to live outside the womb?

A. Only momentarily outside the womb, but only momentarily.

Q. That question again, Doctor, is based upon current medical science and ability for that child?

A. That's correct.

Q. As science advances — and forgetting about abortion for right now — as science advances, do you foresee the ability of science to provide environment for the unborn child throughout its entire stages of development from conception to full term?

A. One doesn't have to speculate. There is work going on already with chemical fluids which would allow for the embryo or fetus — let's call it fetus for the time being; probably relates to an older, 14 or 18 weeks, perhaps, fetus — in which these babies could be delivered and placed into an environment, a fluid environment which would allow for the, allow for the baby to breathe and obtain oxygen directly and nutrition directly through the baby's lungs.

This has been reported in medical literature already. It's speculative. There has not yet been a time when a baby has survived at that point, but speculation would be that it could happen sometime in the future. But certainly the actual experiments have been done and these babies have survived outside the womb for at least a short period of time using this type of technology.

Q. Doctor, these babies that you refer to, are these any less human than children that are being, developing in the womb?

A. If maybe I could put that question in some perspective, it might help all of us. Individual human life is a continuum. It starts at conception and it ends at death. Death, of course, can be at any point along the line for a whole variety of different kinds of reasons.

Let's say that person lives until an old age, the continuum of existence, which is biological, allows us to go through

biological stages. Includes from the moment of conception — because that's where it starts — going through the embryological stages, first eight weeks of life; the next 33 weeks of life, which is the fetal stage of life; the next seven days, which is usually referred to as neonatal period; the infancy period, which is the next one year of life or up to the first year of life; early childhood, which is usually from the first to the fifth of sixth or seventh year of life; later childhood, which is there until the time of adolescence is reached and even then, remember each way along the line, the organism, the human organism is undergoing great changes.

The young newborn is significantly different than the two year old; 10 year old, 20 year old. As the child goes through adolescence, that's another stage of development, tremendous change is going on there as well, most of which are biological or have biological aspects to it.

Once adolescence is reached, then the person goes through early adulthood and then adulthood and middle age. After middle age, we usually reach old age.

Each time there are biological stages present in the human species. There is a beginning, though, to this life and an end to this life. What stage we view ourselves in the line, it would seem to me, at least from a biological and a medical and obstetrical point of view is irrelevant.

The human person and human being is in existence from its beginning, which in this case is the time of conception, all the way through and until its end, which in this case would be the time of death, wherever they might ensue; if it's at the eighth week with a miscarriage, at the 38th week with a stillbirth, in early childhood from leukemia or early adolescence from a drug overdose, middle age from cancer, old age from heart attack, the whole spectrum of human life is a continuum, it continues.

There is a spark or ignition of that life that begins at only one point and that is at the point of conception. There is no other point where it begins. It starts or ignites that continuum.

Q. At the point of conception, Doctor, is this new, individual, this new human being, separate and distinct from its mother, from his or her mother?

A. It is.

Q. Doctor, you testified that you were familiar with the Supreme Court decision, *Roe vs. Wade*, and you also testified that you understand that abortion is legal in the United States, is that correct?

A. That's correct.

Q. Is it your understanding that abortion is legal through the entire nine months of pregnancy?

A. It is.

Q. Doctor, is this appalling to you?

A. I think that's a fair statement.

Q. Why is that?

A. Well, if you believe in the almost miraculous nature of a human person, how it comes into being and how it carries out its existence in its life, killing at any stage of any person's development is just wrong.

Direct Testimony of Vincent Montgomery Rue, Ph.D.

DIRECT EXAMINATION

BY MR. GRABER:

Q. Would you state your full legal name for the record? I know I called you here. We have to get it on the record.

A. My name is Vincent Montgomery Rue, R-U-E.

Q. Doctor, what is your profession?

A. I'm a practicing psychotherapist in the State of New Hampshire; licensed marriage therapist in the State of California.

Q. And your current place of employment?

A. I work in Portsmouth, New Hampshire. I have a small private practice there and also the co-director for the Institute of Abortion Recovery & Research.

Q. Tell us a little bit about the institute, Dr. Rue.

A. The institute was founded by Dr. Susan Stanford-Rue and myself in 1990.

It is a nonprofit scientific organization that is dedicated to three areas. One, to provide intensive treatment for individuals who have experienced psychological harm after an induced abortion. Two, to provide educational training for mental health practitioners both in this country and abroad and; three, to be a clearing house for information regarding the psychological sequelae of abortion, as well as to conduct research in the aftereffects of induced abortion and the decision-making process that would precede it.

Q. Tell us about your educational background, Doctor, starting with your graduate degrees.

A. I have a Ph.D. degree in family relations, child development, family relations from the University of North

Carolina in 1975. I have a master's degree in clinical social work from St. Louis University 1972 and I have a bachelor's degree in sociology from St. John's University in 1970.

Q. After you received your academic degrees, you had work experience?

A. Yes, I have.

Q. And could you please give us that work experience, please?

A. Well, directly after my graduate training, I worked in two capacities. One as a research assistant at the American Institute of Family Relations and, two, as a staff therapist at the Sir Thomas More clinics of Southern California. There I worked with a wide range of individuals, conducted psychological testing, worked with families, individuals, couples and had general experience in working with a general psychological practice.

Q. And what year was this, what years?

A. This was between 1975 and 1990.

Q. During the year 1972, were you employed?

A. In 1972, I was research assistant to Doctor Richard Klemer at the University of North Carolina.

Q. What work did that involve?

A. I was assisting Doctor Klemer in the preparation for a major research project on the decision factors that are involved in an unwanted pregnancy with unmarried women.

Q. During this time, was there any significance to your research?

A. The significance was that during this time, *Roe vs. Wade* was decided and there was a tremendous interest in assisting women in the community we lived in to have a number

of options to deal with the crisis pregnancy and we founded the Problem Pregnancy Counseling Service in Greensboro, North Carolina, which was one of the first in that state at the time.

Q. Doctor, when, if you could tell us, did you begin having clinical contact with people harmed by abortion, what stage of your employment experience?

A. It was during my graduate training, immediately upon referral of individuals to the Washington, D.C. abortion clinics, I would have an opportunity to interact with some of these individuals after their procedures and begin witnessing some traumatic aftereffects during that time.

We were interested in the decision-making process that women went through in determining what was an optimum outcome for them with regard to their crisis pregnancy, but I was very interested in the aftereffects of induced abortion, hearing from individuals that this was not a psychologically safe procedure.

Q. In 1975, Dr. Rue, were you involved in professional practice at some level?

A. Yes, I had both a clinical practice and I also was assistant professor at Cal-state University, Los Angeles, and my final rank there upon departure was Associate Professor of Family Relations.

Q. This was after your research with Doctor Klemer that you mentioned?

A. That's correct.

Q. And how long were you associate professor?

A. During the years of 1975 through 1980, I served as an Adjunct Associate Professor in the School of Fine and Applied Arts in the City of Los Angeles.

Q. Does that bring us to the current situation, Doctor?

A. Yes, it does.

Q. During your clinical experience, what did you actually do in relation to working with those harmed by abortion?

A. Through the years, 1975 through 1990, in my Los Angeles practice, I had an opportunity to work with a number of women, hundreds, who presented with one problem or another, it may have been substance abuse issues, it may have been relation problems, difficulty bonding in subsequent relationships and it was through the course of the clinical description of her history, that I really determined that there was something else operating that was keeping this person stuck from recovering and it was, in fact, the identification of induced abortion and in the final years of my practice in Los Angeles, I would say in the last five years, approximately, a fourth of my patients were presenting with problems related to an induced abortion and in that practice it also included men, men who had participated in abortion decision, men who objected to an abortion and men who have coerced an individual into receiving an abortion and I had never, in fact, indicated that this was a specialty of mine in Los Angeles, these individuals came to me by word of mouth.

Q. Dr. Rue, I assume you have professional associations, licensures, these kinds of matters. Would you give us at least an overview of those?

A. I'm a member of several associations, American Academy of Behavioral Medicine; American Counseling Association; the American Association of Marriage and Family Therapists; Public Health Association of American; California Council on Family Relations; the International Society for Traumatic Stress Studies; the International Society for Stress and Anxiety Research.

And, in addition, I serve as a peer reviewer in a referee journal called *Issues in Law and Medicine*, which is a *Journal of Law, Health Care Ethics and Sociology* for the National Center of Medically Dependent & Disabled; and a member of the Editorial Advisory Board of the *Journal of Medicine and Mind*, which is also a referee journal. This is published in Milan, Italy. It is the *Journal of Philosophy of Medicine and Medical Psychology*.

Q. In your practice, are you affiliated with any hospitals, have you been?

A. In my practice, yes, I have been with several, including Long Beach Community Hospital, Charter Baywood Hospital in my Los Angeles practice. My current practice is restricted at this point in that I have tried to eliminate much of my hospital work so I'm no longer affiliated with any hospital in the New Hampshire area.

Q. What consultations have you provided in your professional capacity, Dr. Rue?

A. I have been active in the area of assisting offices of the attorney generals in several states with respect to statutory changes regarding abortion and abortion restrictions.

Most recently, I was a consultant to the Office of the Attorney General in the State of California in preparation for trial regarding parental consent, adolescent crisis pregnancy decision-making, the role of a family in assisting minor members in the resolution of crisis.

Further, I have consulted with the Office of the Attorney General in the State of North Dakota regarding the issue of informed consent in crisis pregnancy determining and abortion counseling. For the Office of the Attorney General in the State of Pennsylvania, I have been qualified as an expert in the spousal notification and informed consent and

decision resolution and psychological aftereffects of induced abortion.

Q. You are using the word informed consent here, let me stop you. How are you relating the informed consent in your professional consultation?

A. Informed consent is a standard practice of medicine that applies to the knowledge, the volunteerness and the comprehensive ability of the patient to understand the method of treatment.

This particular medical model as applied to abortion decision-making has been my area of consultation and testimony and in this latter case with the Pennsylvania Attorney General's office, I participated in the *Pennsylvania vs. Casey* case that is before the U.S. Supreme Court at this time.

Q. I am sorry to interrupt you. Go ahead with your consultations that you provided.

A. I've also been a consultant to the Ministry of Health in Austria regarding post abortion treatment. I've been a consultant to the U.S. Department of Public Health, the Office of the Surgeon General of the United States in 1987 through 1989.

Q. Dr. Rue, what surgeon general was that?

A. It was Dr. C Everett Koop.

Q. What, specifically, was your role there?

A. President Reagan requested Dr. Koop, that he compile a report to the American public on the psychological health risks of induced abortion.

Dr. Koop, in that mandated, executive order, requested assistance from a number of groups and requested my assistance as a consultant on that abortion project. Therefore, it was my responsibility to assist him and his office in

the examination of the literature, the psychological impact of induced abortion and to assist his office in the preparation of the report to the American people on the psychological health risks of induced abortion.

Q. Did you go ahead and assist in that?

A. Yes, I did.

Q. Did that report, was that report made?

A. Instead of the report being published, the report was made, but it was not published. The politics of why that was not made public are open to speculation, but Dr. Koop did respond to the President's mandate in a four-page letter of January 9 of 1989 and in that letter —

Q. Please go ahead and tell us about the document.

A. Instead of publishing the full report which was prepared, Dr. Koop chose to submit a letter to President Reagan on January 9 of 1989 which I have in my possession here and in this letter he identifies his findings and called for a 100 million dollar prospective study on the, prolonged study, on the effects of induced abortion.

There never has been a long scale study of the health risks of induced abortion, even though this is the most common surgical procedure in the United States of America with 26 million procedures.

So his letter is an important one. It is benchmark as to where we are scientifically with respect to the treatment of this topic.

Q. And you helped prepare that?

A. That's correct.

Q. And what is the bottom line?

A. Dr. Koop concluded, and I quote from Page 2, in my review of this issue, at this time the available scientific evidence

about the psychological sequelae of abortion simply cannot support either the preconceived beliefs of those pro-life or of those pro-choice.

It goes on to say, all of the studies were reviewed and the more significant studies were evaluated by staff of several agencies of the Public Health Service against appropriate criteria and were found to be flawed methodologically. In their view and mine, the data does not support the premise that abortion does not cause or does not contribute to psychological problems.

In other words, Dr. Koop is saying based upon flawed studies, it would be erroneous for us as a nation to rely upon opinions that are ill-formed, from studies that are weak. Therefore, abortion cannot be concluded to be psychologically safe.

Q. Have you done consultations in other countries, international consultations?

A. I recently returned form Beijing as an invited expert in the First Delegation of International Specialists in Post Traumatic Stress as one of the first experts ever invited into the Republic of China in my capacity in the area of pregnancy loss which includes induced abortion and in that capacity, the Chinese Medical Association, as well as the Faculty and Research Director of the National Institute for Research in Mental Health at Beijing University accepted my paper for presentation last month in Beijing on induced abortion and pregnancy loss.

Q. Have you done publications, have you provided publications to your profession on your topic?

A. Yes, I have.

Q. And have you done any referee publications?

I've published in several journals that are referee, meaning peer reviewed where the author's name is deleted and submitted for review by other experts. Yes, I've had several of those to be published this year.

Q. How about presentations, Doctor, to whom and in what professional capacity are you making professional presentations on giving your expertise?

A. Well, as I mentioned earlier, I have just recently presented in the Peoples Republic of China to the faculty, postgraduate medical university in Beijing.

Just last night I found out that my paper was accepted for presentation in Amsterdam in two weeks on abortion as trauma and it is the First World Congress on Trauma, a gathering of experts from around the world on the diagnosis and treatment of trauma and, in addition to that, I have presented at numerous other professional convocations.

At the Second European Congress of Psychology in Budapest, Hungary, I presented a paper on Post Abortion Syndrome and one on The Psychological Sequelae of Induced Abortion in Czechoslovakia.

As well as I've lectured at a number of medical schools, including U.C.L.A. in this country, and other medical schools throughout the country and the world and these generally have been in the area of abortion, pregnancy loss and abortion as trauma.

Q. You have been qualified as a expert witness in a number of cases, have you not, Dr. Rue?

A. Yes, I have.

Q. Would you give us just a review of the federal cases that you have qualified in, maybe some of the state cases?

A. In 1982, I testified for the state in *Indiana Planned Parenthood vs. Pearson*, U.S. District Court, on behalf of the

office of the attorney general and the people of Indiana. I submitted affidavits and that was with respect to parental notification.

I presented affidavit testimony in the Kenai Peninsula in Alaska on informed consent in 1983.

Presented testimony in the *Planned Parenthood vs. Rhode Island*, Providence, Rhode Island, as an expert witness for the State of Rhode Island for the office of the attorney general.Two Supreme Court court cases; I provided testimony at trial in the *Hodgeson* case, *Hodgeson vs.Humphrey*, in 1984, on behalf of the state for parental notification regarding abortion decision-making and the importance of parental involvement in that process. And then in the leading Pennsylvania case in 1990, *Planned Parenthood vs. Casey* in district court, which is now before the U.S. Supreme Court.

Q. Dr. Rue, what is that exhibit, please?

A. This is a copy of my Curriculum Vitae.

Q. Other than anything we've testified to, you've testified to, is there anything missing? Are we up to date?

A. My testimony — I'm not sure the date of that, but with my testimony today, we're up to date.

MR. GRABER: Your Honor, I would ask the Court to take this, rather than spend any more of the Court's time going through this, and I would proffer to the Court Dr. Rue as an expert witness and ask his testimony be allowed on the harmful causes and effects of abortion, psychologically-speaking.

THE COURT: Ms. Chalker?

MS. CHALKER: Regarding the exhibit, the City would again object. It is irrelevant and immaterial and probably cumulative of what we've heard today.

Regarding Dr. Rue's qualifications as an expert, I have no objection that he's an expert in sociology and child development. Beyond that, it's within your discretion.

THE COURT: I'll make a finding that Dr. Rue is an expert in the area proffered. Please proceed.

MR. GRABER: Thank you, Your Honor.

Q. (By Mr. Graber) Dr. Rue, during qualifications, it appears that much of your work deals with harmful effects of abortion. What kind of harms are you talking about, sir?

A. The psychological after effects of induced abortion is a complex area and the harm is manifold. It's not simplistic and can't be pigeonholed into one precise area.

We see a continuum of harm after induced abortion. And it ranks, from what is described in the literature, as an adjustment disorder, which we call post abortion distress, something that occurs immediately after an induced abortion, up to a three month period and is fairly remedial, that is open to treatment; Continuing on a continuum to post abortion syndrome, which is a more serious form of the after effects of induced abortion, which is a type of post traumatic stress syndrome and post abortion syndrome by definition does not resolve itself spontaneously or characteristically on its own. As a requirement, then, it necessitates intensive treatment;

Continuing the continuum, on out to a very serious dysfunction psychotic to abortion which we call post abortion psychosis and here we see breaks in reality, we see delusion, significant mental impairment and suicidal ideation and suicidal gesture.

So the effects of abortion along this continuum vary with respect to the psychological fragility of the patient preabortion and varies with the degree of trauma that occurs at the actual abortion itself and within the context of these

three, if you will, diagnostic areas, we see a host of symptoms that will include depression, survivor's guilt, relation disruption, impact of guilt, nightmares, sleep disorders, unwarranted re-experiencing of the abortion trauma, efforts to avoid or deny the meaning of the abortion and unwanted remembering.

We see flashbacks, anniversary reactions either on the abortion date itself or when the fetal child would have been born. We see a sense of foreshortened future, a person doesn't believe they are going to have children, that their lives aren't worth living, self-depravating behavior.

We see emotional numbing, which is common in post abortion stress disorder when an individual, based on the denial and overload of feelings, becomes numb, can no longer feel, in general. This causes problems, in turn, in relationships because it causes problems in subsequently bonding with children and this further isolates and stigmatizes an individual and it prevents them really from seeking help because they feel very alone.

They are not familiar with these symptoms and generally this is what we call post traumatic decline. Their lives worsen, not improves. So there's a host of symptoms.

There are three general areas of psychological impairment after abortion and these have been validated in clinical literature. They have been validated substantially with my interaction with colleagues in this nation and abroad and have been validated with my conversations with individuals both in this country and abroad who have come up to me after my presentations and said, this had happened to me.

Q. Dr. Rue, what is the more common of these three general categories regarding post abortion harm?

A. It's my experience that post abortion psychosis is not normative; nor is post abortion distress, which is an adjustment disorder. That is a relatively mild, transient response.

Rather, for women that are negatively impacted by abortion and certainly the ones that have participated in my clinical treatment programs, it has been more of the type of post traumatic stress disorder or what we call post abortion syndrome, that most function and suffer. They can no longer cope, themselves, individually, privately, yet their coping mechanisms have not deteriorated to the extent that they have developed a psychotic reaction. But they are impaired in their functioning and that impairment is painful, it is significant and it is problematic in their everyday life, so they seek treatment.

So the post abortion syndrome component to me is more normative than the other two.

Q. And is abortion listed, Doctor, in the D.S.M. III-R?

A. Abortion is listed in the Diagnostic and Statistical Manual of Mental Disorders which is our Bible in the psychiatric, mental health field. It is listed on Page 20 as a type of Psychosocial stressor, and as such —

Q. We were at page 20. This is listed — how is abortion listed?

A. Abortion is listed as a type of psychosocial stressor and if you'll bear with me, professional jargon for a second, a psychosocial stressor is capable of causing a post traumatic stress disorder of which post abortion syndrome is a type.

Post abortion syndrome is not identified in the D.S.M. III-R, but post traumatic stress disorder is and abortion, as a type of psychosocial stressor, is identified in the D.S.M. III-R.

Q. Are there other such disorders that are not specifically identified in the D.S.M. III-R?

A. Yes, there are. An example of that would be rape syndrome which is also a type of post traumatic stress syndrome; battered woman syndrome, a woman who has been subjected to severe emotional, physical assault. This type is stress disorder but currently not listed in the Diagnostic and Statistical Manual of Mental Disorders.

Q. Dr. Rue, in the law we sometimes look at things elementarily, and we look at the facts, and if those facts show certain elements to be existing, then we say we have a certain legal concept, that it exists.

For example, a crime, for example, a homicide, we have elements, unless all of those elements were there, we wouldn't have a homicide.

Using that for analogy, could you tell us, tell us what are the elements of this stress disorder, this post traumatic stress disorder that you are talking about?

A. In the D.S.M. III, for a clinician to concur and to diagnosis the existence of post traumatic stress disorder, there are four basic components or elements that must be identified.

The first is a stressor event that is outside the range of usual human experience. And I'll simply quote from this. I think it's instructive.

They give as an example on Page 250 serious threat to one's life or physical integrity, serious threat or harm to one's children, seeing another person who has recently been or is being seriously injured or killed as a result of physical violence.

So, a stressor event must be significant, must involve a very serious threat to either one's own sense of safety or to a person like one's child and this stressor event that is capable of causing the remaining symptoms which I'll identify.

The second component of post traumatic stress disorder is that the traumatic event be reexperienced in at least one of the following cases. First, in recurrent and intrusive distressing recollections of the event. In young children repetitive play in which themes or aspects of the trauma is reexpressed. Two, recurrent distressing dreams of the event. Three, sudden acting or feeling as if this traumatic event were recurring today, even though it had occurred years or months or weeks earlier. This is what we describe as flashbacks or dissociated reactions. Four, intensive psychological distress at exposure to events that symbolize some aspect of the traumatic event. Anniversary reactions are a part of this component.

For women who have had abortions, they re-experience the event and this can take place when they go for a standard O.B./G.Y.N. check, when placed in the stirrups for examination.

The third component of post traumatic stress disorder is persistent avoidance of stimuli associated with the trauma or numbing of general responsiveness not present before the trauma — and that's important because if it was present before the trauma, then we would exclude this — as indicated by at least three of the following seven factors.

It goes on to list, efforts to avoid thoughts or feelings associated with the trauma. The person blocks these, does not want to focus on them. Efforts to avoid activities or situations that arouse recollections of the trauma. For some, an inability to recall that they even had an induced abortion or a trauma experience. In others diminished interest in activity. Others, period of detachment or estrangement from others. Restricted ranges of affect. In other words, inability to have tender or loving feelings and, lastly, a sense of foreshortened future; I don't expect to have a career, a marriage and child, etc.

Lastly — this is a very important component — persistent symptoms of increased arousal, again not present before the trauma but manifests after the trauma and these can include problems relating to sleep, difficulty controlling and managing anger, difficulty concentrating, hyper-vigilance, startle reactions, physiologic reactions when exposed to events that resemble the trauma experience and often these are misdiagnosed as the primary problem when, in fact, in the presenting practice, they are secondary to the trauma.

In the days following an induced abortion, often people with sleep disorders, that is identified erroneously as the primary disorder, when, in fact, it's secondary to the experience of the induced abortion.

Q. Doctor, you indicated that there are the four stressors or the stressors of serious bodily injury, significant bodily injury, killing or harm. Now, of these stressors, in your experience, your clinical experience, when women present to you, which stressor is most predominant in your clinical practice?

A. With respect to induced abortion, it is within my clinical experience that the patients who are harmed and who are exhibiting the symptoms of post traumatic stress are experiencing this trauma because they perceive that this was an intentionally-caused, human death experience and as such, they feel deep grief and remorse, survival's guilt and present with symptoms of re-experiences that are unwanted. It is a psychological trauma that they, themselves, have been unable to resolve on their own and are seeking professional assistance and it is primarily because of the reality in their minds that they have killed their unborn child.

Q. How is it that they present to you subsequent to this experience saying we just had this realization? Why is it coming after the fact?

A. A common occurrence in young adult patients of mine is that they had an abortion when they were in their teen years, did not understand how they became pregnant, much less what the abortion did to the pregnancy and then later on in their early adult life, when they marry and then have a subsequent pregnancy, go to the O.B./G.Y.N.'s office and he says, your baby is fine, and then gives the individual either the opportunity through ultrasonic examination or fetal description of characteristics of fetal development, it is at that moment that a person's perception of the trauma earlier on in their life is altered and new information is provided and that person then recognizes that a human death experience has occurred and, therefore, exhibits and commences the grief process at that point.

Q. I don't want to put words in your mouth. Are you saying that they weren't, aren't given education on the results of abortion, what the result would be of abortion at the time of the abortion?

A. My patients have consistently said to me, and as well it's been my experience in corroboration with other colleagues both in this country and abroad, that women, pre-abortion, are at great risk of making decisions in an informational void and that void includes the complete absence of any accurate description of human development, namely fetal and embryonic development, complete absence of any description of the psychological risks involved in this procedure, and are exposed to counseling that is wholly inadequate, biased, and, in my opinion, harmful for the health of these individuals.

So, it's been my experience that it's no surprise, it's no surprise that women are traumatized after abortion because they are ill-prepared for it.

Q. Why do you say the counseling is inadequate and harmful? What brings you to that conclusion, professionally?

A. Through my opportunities to examine the information protocols provided at abortion clinics throughout this country, from my conversations with patients and other individuals who have experienced abortion, it is clear to me that the abortion counseling that is provided is deficient in a number of areas.

It's deficient with respect to the time limitations of such an important, significant and irrevocable decision.

It is deficient in the area of the opportunity for the individual to be counseled privately, in that the majority of clinics provide group counseling settings and when group counseling is provided, while it can be a benefit, it is inadequate in evaluating the psychological status of the individual, the pre-abortion history which includes their psychiatric history, psychological history and that the many risk factors that are very clear in the literature, some 15 predictors of psychological traumatization that can occur after abortion, it's simply not possible to evaluate these within the context of a very brief, one time contact, the same day of your abortion within the context of a group setting and within the context of an individual who's not professionally trained, generally, that is the abortion counselor who, he or herself, is biased and I think her presence, providing, quote, unquote, objective counseling in a conflict of interest setting is problematic for the patient and lastly that there is an informational deficit that affects whether or not an individual can provide an informed consent, and in my opinion, current abortion counseling practices in this nation, it is not possible for American

women to render an informed consent because of those factors that I've identified. And, therefore, they are at risk of psychological traumatization.

Q. Doctor, a moment ago you indicated that some women actually do not even recall the abortion experience. Are there any studies, is there any evidence to give us any detail on this phenomenon?

A. The phenomenon is called psychogenic amnesia. It means that one way of defending against unwanted memories is to block from memory any conscious recall of a trauma event and there is abundant evidence in the trauma psychological literature.

I have seen it time and time again at my clinic where an individual who has been severely abused in their childhood, blocks all remembrance of sodomization by a drunken father at the age of seven, blocks that out for decades and then suddenly, with a stimuli that can trigger an association, the recall is there.

So psychogenic amnesia is common in the management of problems but it's not a functional, that is a helpful coping mechanism. It's one that I think impairs an individual's opportunity to grow and psychologically become stabilized. It's an inhibitor of that process and can be harmful.

Q. Do you have any empirical data that tells what percentage of people that suffer from this?

A. From psychogenic amnesia?

Q. Yes, this phenomenon that people do not recall.

A. We do not have any studies with regard to induced abortion, but we do generally in the area of trauma and I've seen studies that indicate psychogenic amnesia is present in 10 to 25 percent of the patients who suffer traumatic circumstances.

Q. You indicated risk factors. It would seem — we have this significant risk factor, accumulation of risk factors — it would be important for us to know what those are. Could you identify those for the Court, please?

A. From my evaluation of some 239 studies on the psychological risks of induced abortion, it is clear in the literature that these 15 risk factors are predictors of traumatization.

While there is some disagreement among scientists about all of them, there is universal concurrence that a number of these are present and are predictors and must be evaluated and they are as follows: first, a prior history of emotional or mental illness.

Of all of the 15, the research is universal that if an individual has a prior history of psychological fragility, hospitalization for psychiatric reasons, emotional illness, mental illness, that abortion is contraindicated.

Q. Contraindicated means for us?

A. That the decision to proceed with an abortion should not be allowed, that this person is a special circumstance, requires special care and is at risk for a decline of traumatization, a worsened original state, if she goes ahead with an induced abortion. The literature is clear on this.

Q. How significant, to what degree must the mental illness have affected the person or how serious before it's contraindicated?

A. Well, again, it's across a continuum. But what is terribly important is that history be identified and maybe she has resolved many of the issues from incest or from a rape or from an alcoholic family in her past, maybe through treatment she has resolved that so it's not necessarily an absolute impediment for an abortion.

But it's an absolute necessity that it be evaluated and generally in the evaluation, one would want to look at the decision-making capacity that person has, the degree of resolution of prior traumas, their coping abilities and etc. and all of this, of course, takes time and a professional evaluation.

So the first risk factor is a terribly important one, especially when we look at the etiology in the United States. What percentage of American women are psychologically healthy — not picking on women. We could ask the same question of men. But what percentage? Is it 90 percent of American women have no emotional or mental illness? I don't think so.

Given the statistics on what we see in early childhood trauma, I've seen statistics that would suggest one out of four women have been traumatized in their early childhood years sexually and that carries on into adult relationships.

In any event, the assessments of prior emotional and mental illness is a necessary fact to be evaluated.

Secondly, immature interpersonal relationships. Third, unstable, conflicted relationships with one's partner. Four, a history of a negative relationship with one's mother. Five, ambivalence regarding abortion, and on this one, it is generally a given in the literature that most women are highly ambivalent regarding abortion and that after abortion most women feel guilt and guilt is highly correlated with ambivalence.

Six, a religious or cultural background hostile to abortion and this is also an important one because in recent national analyses on how American women perceive abortion from a moral framework, it is clear that the majority perceive abortion as immoral and because of that, that is something

that needs to be evaluated before the abortion as to how that conflict can be addressed in this person's function.

Seven, single status, especially if one has not born children.

Eight, age, particularly adolescents versus adult women.

Approximately one out of three induced abortions in the United States, 1.6 million annually, approximately one out of three, is conducted on an individual under the age of 21 and adolescents are an unusual group of decision-makers because they are prone to impulsive decision-making, egocentrics and the vulnerability of that special age, state. that they are in. They are not children, but yet they are not adult.

So age, namely adolescent, is something again where we need more pre-abortion counseling than less.

Nine, second trimester versus first trimester abortion.

10, abortion for genetic reason. That is fetal abnormality.

11, pressure or coercion to abort. The literature is universal on this particular risk factor, that where there is coercion or pressure, traumatization is a given.

12, prior abortions. This is also important because today 43 percent of the 1.6 million induced abortions in this country are repeat abortions.

The literature suggests that individuals who use abortion as a form of birth control suffer tremendous problems and pain in recurring relationships, with depression, with lowered self esteem and have difficulty in subsequent pregnancies.

Freud talks about a repetition compulsion, which is a way of masking trauma and a person that is overwhelmed by trauma, may go out again and get pregnant to unconsciously resolve the trauma of the first abortion.

Hence, without treatment, without the recognition that there is grief work to be done, an individual with a prior abortion runs the risk of post traumatic decline by becoming pregnant again, feeling overwhelmed and then going out and seeking a second, third, forth, five and six induced abortion.

In my practice, I can tell you that the most impaired individuals that I have worked with in 15 years have been individuals with multiple abortions. It is generally true that in their background, there is pre-abortion trauma that is unresolved. It is generally true that the first induced abortion was, took place in adolescence and it was unresolved and then the remainder of their life has been a neurotic living out of the self-denigrating behavior.

13, the existence of prior children.

14, maternal orientation; an individual who has generally warm maternal feeling towards babies and children;

And 15, biased pre-abortion counseling.

Q. Dr. Rue, you indicated earlier that there are others than just the woman who suffer the harm or harms from abortion. Can you tell us detail on that? Who else suffers?

A. In my clinical experience, as well as from the literature, it is clear that abortion never takes place within a relationship vacuum; that indeed even when individuals make decisions about abortion in silence, in secrecy, that others are impacted and they begin with one's mate.

Research is clear that the majority of unmarried relationships, post abortion, decline and in the end, fail post abortion. It is a burden that is too heavy to bear between lovers.

The story of men in abortion is an untold story. It is similar to the story of female Vietnam veterans who are scorned and stigmatized for reporting symptoms of post traumatic

stress after Vietnam and it is the story of men who desired to have a child and their girlfriend or wife elected not to. It is the story of traumatization, loss and grief on the part of men. Not all men, but some men suffer grievously.

In my practice, I treated two girlfriends whose boyfriends committed suicide in Los Angeles after being tortured for several years with fetal nightmares and flashbacks about an unborn child demanding that this father rescue them from abortion. These individuals decompensated and ultimately took their own lives.

Abortion affects not only woman, it affects men. In the case of a woman who's an adolescent who elects abortion, it affects parents, the surviving grandparents. They too, if they coerced the abortion or felt in some way responsible, they can feel very guilty and depressed; they may overprotect, over control their daughter in their future relationships.

I have worked with subsequent children where their mothers elected to abort one of their siblings, and assisted the mother as well as those children in coming to grips with the reality of what that abortion has meant.

I'll give you some examples. When an abortion occurs when there are young children in a relationship, the mother may become overprotective of the surviving siblings. She may become pregnant again in an effort to undo the abortion and have what is called a replacement child or the children may live in fear and distrust of the parent; feel that the parent is truly murderous and dangerous and have a sense of dread that at some point where they do something wrong, they too can be eliminated form the family picture and the effects on children have not been studied well but there is ample clinical evidence that suggests we must not neglect this population as well.

So, the after effects of induced abortion do not occur within a relationship vacuum but instead affect and impact literally every relationship that the woman has of significance in her life.

Q. You indicated earlier this post traumatic stress disorder would result in maybe some future time when a mother may realize that she had aborted, had killed the child. Does it also require, does it ever happen that this realization is different for other members? For example, a husband or a father or a child? Different than the mother's, is what I'm saying.

A. Yes. Again the effect of abortion on relationships is a complex one. For some individuals — we call them partners in trauma — the woman's awareness of the loss may lag behind the man's.

There is research that suggests some men are impacted more than woman after abortion.

Rochler (sp) followed one thousand men to abortion clinics and found that the aftereffects of induced abortion in men were far more serious than he had anticipated and research by Madison and others in 1981 suggests that in marital relationships, partners in trauma are unable to resolve abortion trauma when they do not communicate about the abortion experience, when they are unaware of the differing degrees of grief that their partner, their spouse is going through and defensive communication patterns become established, hostility becomes evident, distrust and the loss of intimacy and for some, abortion impacts them in the psycho-sexual area, abhorring any contact with their male partner in sexual pleasure, sexual gratification. For others, as I indicated, who feel very guilty, they may become very self-degrading and promiscuous in sexual relationships.

Q. Dr. Rue, in pleading before this Court and from an early time we began this case, we asked the Court to hear evidence on a couple of issues. Especially we asked the Court to hear evidence on one aspect of the defense that would require us to demonstrate not that she was correct, but that she was reasonable — she being Mrs. Tilson — she was reasonable in being involved in what is called a rescue, not a protest, a rescue at an abortion clinic, to enable sidewalk counselors to speak with those women coming to this clinic prior to the abortion, knowing this is a one time event, hopefully to save life, that being the life of the baby and to save the woman from trauma and detrimental effects and harm of abortion.

In your professional opinion, was she reasonable in that approach?

A. It's my belief, based upon my clinical experience, my reading and knowledge of the literature, my conversations with individuals in this nation and abroad, that it would be entirely reasonable for an individual to be concerned about the very real psychological risks of induced abortion. It would be entirely reasonable and warranted.

CROSS-EXAMINATION

By Ms. Chalker:

Q. Have you ever been to the Family Planning Clinic located on East Central, here in Wichita, Kansas?

A. No, I have not.

Q. And, likewise, you've never interviewed or spoken to any of the counselors at that clinic, is that true?

A. I don't know that that is true. I have conducted various training seminars around the country on the area of post traumatic counseling. I recall a recent one at the University of Dayton and there were a number of abortion counselors

present there, so I can't speak with certainty that I haven't, but —

Q. You don't know of the specifics or the specific aspect of the counseling that is provided by the Family Planning Clinic here in Wichita, is that also a fair statement?

A. I don't know what the specific counseling protocol is here, no.

Q. You indicated that post abortion counseling is a very important aspect to help alleviate any psychological harm that may have been caused by the abortion, is that correct?

A. It is part of what I see as an important remedy to prevent a woman from being traumatized. I also said that thorough pre-abortion counseling is necessary.

Q. Along that line, you don't know what post abortion counseling or pre-abortion counseling is done at that clinic, is that true?

A. I am not aware of the specific protocols at that particular clinic.

Q. You have not interviewed or done any research an the individuals who have received abortions at that specific clinic, is that also a fair statement?

A. I can't answer that definitely because, again, I have spoken with a number of individuals in various different presentations around the country and it's entirely possible that women who have gone through this clinic's program may well have participated and discussed their abortion experience with me.

Q. To your specific knowledge, you have not interviewed an individual or a spouse or a child of an individual who has had an abortion at that specific clinic?

A. Not that I can identify by recall at this point.

Q. So, the majority of your opinions that you've expressed today have been based on your research or other individual's research that is not or was not concluded or conducted here in Wichita, is that also a fair statement?

A. I don't know because the literature is full of studies, these 239, and I would suspect some of those may have involved people from Kansas.

Q. And can you point me to any specific study that shows the psychological aspect of women say in Kansas who have participated in abortions here in Wichita or in other facilities in Kansas regarding any psychological trauma to those individuals?

A. I think I can. I think there are two studies that did involve individuals from Kansas and one of them is the Vaughn study. She included 39 states. To my recollection, Kansas was one of them.

And the second study was by Reardon and I believe there were representatives from Kansas present in that protocol, as well.

Q. You don't know whether or not those individuals had abortions here in Wichita?

A. I don't know which clinic they went to, other than that their residence would have been in Kansas.

Q. People respond in different ways emotionally to an abortion, isn't that correct?

A. That's correct. There are, there's a wide variation of response. However, in the psychological arena, as I have described, we see a continuum of harm.

Q. But the basis for these studies are individuals who have gone in and have gotten counseling, isn't that correct?

A. No, that's incorrect.

Q. But not all women who have had an abortion go and seek out counseling, is that true?

A. The vast majority of studies on the psychological health risk to induced abortion were not anecdotal studies. That is a description of clinical populations. In fact, in the 239 studies we reviewed, we explicitly threw out view studies and clinical interpretation for that reason. It could introduce a systematic bias into our median analytical procedures, systematic analytical procedures that could suggest that all women are like clinical population and I think that would be erroneous.

Therefore, in our study, we looked at 32 retrospective studies that had been done on induced abortions and 32 prospective studies.

In a retrospective study, one is asked, in your history have you ever had an induced abortion, and then we followed that up with a number of questions about how they have functioned since that time.

In the 32 prospective studies we looked at — an individual is followed longitudinally from the point of abortion, excuse me, from the point of the inception of the study through the event of an abortion and then past the abortion.

So, that the majority of studies that are in the literature are not clinical studies. They are, in fact, epidemiological assessments of psychological reactions of humans who are not patients.

Q. Would you agree, Doctor, for some individuals, it's an emotional stressor to carry a baby full term?

A. For some, it is.

Q. For some, it is emotionally damaging to place the baby up for adoption, is that true?

A. Yes, there is evidence that adoption or live birth and delivery can present trauma. There's some evidence of that.

Q. And, likewise, Doctor, isn't it true that simply being a parent for some individuals can be emotionally damaging or at least stressful?

A. Certainly.

Q. Not all woman in the studies experienced post traumatic stress disorder following an abortion, is that correct?

A. That is correct.

Q. Doctor, you also don't know whether or not the clinic located here on East Central provides individual counseling as opposed to group counseling, isn't that also true?

A. I am not aware, as I testified earlier, as to the specific protocols.

Q. The decision of whether or not to have an abortion is left up to the individual pregnant woman, isn't that a fair statement?

A. I don't know that that is a fair statement. It's been my experience that a number of woman feel pressured into having an abortion, feel misled at abortion clinics by providing of erroneous and false information.

Q. But the ultimate decision is made by the woman, isn't that correct?

A. Again, I would qualify in that and say that a number of individuals may, in fact, make the decision to have an abortion, but may be wanting to please their partners, their parents, their girlfriends and their decision is not entirely voluntary, if you will, and I base that upon my clinical experience, as well as the literature that would suggest that individuals in making these decisions are really in a state of shock and having a crisis pregnancy and, therefore, their

decision-making skills, their opportunity to evaluate the complexities of their decision are impaired and they really need and require counseling of an extensive basis.

Q. I believe you alluded to this earlier. The decision of having a abortion is a complex issue, isn't that correct, and there are a number of factors weighed by the individual when that decision is made?

A. There are a number of factors that ought to be weighed by the individual, but in my opinion, generally are not.

Q. And I believe that you enumerated several factors in determining whether or not an abortion was the optimum decision for that individual, is that correct?

A. I don't believe I used the word optimum. I believe I testified that in the resolution of a crisis pregnancy, there are a number of factors that ought to be carefully evaluated before that individual proceeds with one outcome or the other.

The topic today has been the area of induced abortion and that's why I have presented research and clinical evidence of those factors that are highly predicted of trauma.

Q. Currently you have no hospital privileges, is that correct?

A. That's correct.

Q. What percentage of your time is spent consulting as opposed to actually practicing?

A. I don't understand your question. Consulting in what?

Q. Consulting, serving as an expert witness, research. Can you break down your practice as to how much is currently spent on research, or consulting or testifying work as opposed to actual practice?

A. For 15 years, the bulk of my work was clinical domain in Los Angeles, vast majority of it. In leaving Los Angeles, I made the decision I wanted to do more consulting work

and more publications and for the last few years, the majority of my work has been in that area.

Q. Since leaving the Los Angeles area, the majority of your work has been consulting, publications area?

A. Publishing, consulting, that's correct.

Q. You would agree, Doctor, the effect that the abortion has on parents, grandparents and siblings, that varies greatly, depending on the circumstances on which were present at the time the abortion decision was made?

A. I wouldn't say that that is the significant predictor. While that's one of them, I would say that a more significant predictor is the status of the pre-abortion relationship within the family system and whether or not that was dysfunctional.

Q. So the opinions you have given today aren't necessarily absolute, but they are more dependent upon the factors involved in the decision, the emotional stability of the patient or the mother prior to the abortion and there's a number of factors that go into those, in your opinions, isn't that also correct?

A. Well, my testimony is based upon my rather substantial experience in working one to one with individuals, with families, couples who have experienced induced abortion. It is based upon my research, my understanding of the literature and to the extent that every person is unique, has psychological composite that is unique to that person.

It is difficult to generalize to all people, but upon my experience and the literature, I have testified that individuals can be harmed from the induced abortion and that I don't believe that that figure is insignificant from a public health point of view, and I might add, neither did Dr. Koop.

Q. Thank you.

REDIRECT EXAMINATION

BY MR. GRABER:

Q. Just briefly. Doctor, are there any studies that show that Kansas or Wichita, for that matter, the Family Planning Center on East Central shares or exhibits any special degree of care in the abortion industry?

A. I have no evidence to indicate that the protocol in Kansas is unique to any of the other 49 states in this country.

On the other hand, I have testified and believe that it is the norm in this country — and there may be exceptions — it is the norm that individuals who seek abortions and depend upon quality pre-abortion counseling are sadly mistaken in that the services rendered are deficient and I've identified those deficiencies.

I think because of those deficiencies, an individual is at risk for traumatization and it is something that is in need of remediation.

Q. As much as we love us, there's no indication in studies Kansans are more psychological sound and score higher than our members of society, is there?

A. I would not be able to testify that Kansans have a monopoly on mental health as opposed to the other 49 states' citizens. Rather, I would think that the citizenry of this fine state would be equivalent to other citizens, other traumas, other families that people generally posses throughout the other 49 states.

Q. The opinions that you've rendered today, they have been based on a reasonable degree of psychological certainty, have they?

A. They have been based upon my clinical experience, my knowledge of the literature and the extensive conversations

I've had with others. To a reasonable degree, my professional opinion is based upon those variables.

Q. You were asked on cross-examination if it was not true that it's emotionally stressful for a woman to adopt out an unwanted child or even to give birth to that child and, lastly, whether it was stressful even to be a parent.

Would it be an appropriate psychological response to kill a child if you were a parent because it stressed you?

MS. CHALKER: Irrelevant, and improper; I'll object.

THE COURT: I'm going to sustain the objection.

Q. (By Mr. Graber) What would be the appropriate response, normative response if you were a stressed parent from being a parent?

A. I have treated parents that have murdered their children in the early years of life, highly stressed individuals, dysfunctional individuals, who have in the desperation of the moment, committed homicide.

The normative response, sadly, today in the United States is to be abusive either emotionally or physically in high stressed reactions when there are certain predictors present.

A typical coping strategy, however, would be much less severe, one that could involve some corporal punishment, overreaction on the parent's part, overmanifestation of anger and frustration.

Again we see a continuum of reactive response, but in the area of adoption and in the area of live birth, the research that I'm familiar with does not suggest the same degree of trauma, that the percentages are not as high as induced abortions.

In fact, in the largest study that has ever been done in the world, a study in Denmark in 1981, Dr. Henry David, they found in looking at 97,000 women, that 71,000 women

went to term, 27,000 women aborted. They screened all individuals before this reproductive event.

They screened them for one year to determine whether or not there was any history of psychiatric hospitalization. Then they followed these two groups for three months post reproductive event.

Dr. David found — it's rather incredible finding because the sample size is not even a sample, it's, in fact, the entire population of the country of Denmark — Dr. David found women that elected abortion had higher rates of psychiatric hospitalization than women who delivered and that women who were not in a supportive relationship, made their decisions in secrecy, these woman had a four times higher rate of admission to psychiatric hospitals if they elected abortions.

So the research on the aftereffects of postpartum depression, the aftereffects of adoption, do not indicate that there are not psychological aftereffects, no, indeed, they do, but when compared to other pregnancy outcomes or pregnancy loss outcomes as in adoption, we see quantitative and qualitative differences and at this time we are commencing a rather large scale study to further study this issue because it is such a relevant one.

But it has been my experience that the psychological harm from induced abortion, at least at this point from the literature, the individual runs higher risk of traumatization than from other reproductive losses.

Q. You talk about the D.S.M. III-R and the post traumatic stress disorder. Are either parenthood or adoption listed as stressors there? Parenthood or adoption, would that be a trigger stressor for the syndrome?

A. No, they are not listed because those were not identified and indeed would be excluded as something outside of the range of your usual human experience.

Direct Testimony of Beverly A. McMillan, M.D.,

BY MR. BATAILLON:

Q. Dr. McMIllan, would you please state your full name and address?

A. Beverly A. McMillan, 1501 North States Street, Jackson, Mississippi.

Q. And Dr. McMillan, what is your profession, please?

A. I am a physician and obstetrician and gynecologist.

Q. And can you tell the Court, please, a little bit about your educational background?

A. I received my medical degree from the University of Tennessee in 1966. I interned at Baptist Memorial Hospital in Memphis in 1967.

From 1968 through 1970, I was in my residency training in obstetrics and gynecology at the Mayo Clinic in Rochester, Minnesota. The last six months of my residency, from 1970 through 71, I was at Bethesda Hospital in Cincinnati, Ohio. That was my medical training.

Q. Doctor, did you have any type of specialty that you were training —

A. No, I'm a general obstetrician, gynecologist.

Q. Can you tell the Court, please, what that entails?

A. Obstetrics and gynecology is the specialty that deals with woman's health issues, particularly as relating to child bearing.

Q. Doctor, are you associated with any medical associations?

A. Yes, I'm a member of the Mississippi State Medical Association; the American Medical Association; the American College of Obstetrics and Gynecology; county medical association, Central Medical Society. I'm board

certified by the American College of Obstetrics and Gynecology.

Q. And Doctor, are you o[illegible] staff of any hospitals?

A. Yes.

Q. And what hospitals are those, please?

A. Currently I'm on the staff at Mississippi Baptist Medical Center in Jackson; Woman's Hospital in Jackson, River Oaks Hospital, St. Dominic's Hospital and I'm on the teaching staff of the University of Mississippi Medical Center.

Q. And what type of practice do you do now?

A. General obstetrics and gynecology.

Q. Can you tell the Court some of the services that you provide to your patients?

A. I see patients in my office for routine annual exams and pap smears, for family planning advise, for diagnosis and care of pregnancies, for treatment of gynecologic problems such as abnormal bleeding problems, both hospital services to include delivery of babies and gynecologic surgery such as hysterectomies, D and C's, etc.

Q. Doctor, do you also deliver babies?

A. Oh, yes.

Q. How many, approximately how many babies have you delivered in your career?

A. Several thousand. I have not kept a strict count.

Q. And, Doctor, how long have you done this practice in Jackson, Mississippi?

A. I started that practice in 1975 in Jackson.

Q. Doctor, are you familiar with the procedure of abortion?

A. Yes, I am.

Q. And how are you familiar with that procedure?

A. From 1975 through 1978, for three years, I was the medical director and an active abortionist for Family Health Services, which was a first trimester abortion clinic in Jackson.

Q. Did you have any other training with regard to abortions prior to that time?

A. Yes. When I was on the teaching staff at the University of Kentucky, which was my first job after coming out of residency training program, I first began performing abortions.

That was prior to *Roe* in 1971 and we had a mechanism where individual cases were reviewed by committee and I was trained by my boss, Doctor Green, and I performed a number of abortions as a staff physician.

Q. And Doctor, I think you mentioned that you did a residency at Mayo?

A. Yes.

Q. Did you have any training at Mayo with regard to performance of abortions?

A. Indirectly. We had to spend six months of our residency training at Cook County Hospital in Chicago. Six weeks of the time that I spent there was on a ward called the Infected O.B. Ward.

The majority of our patients — we would admit 15 to 25 women every night on that service — the majority of those women had had illegal abortions and would come into County with problems of infected or incomplete abortions and we would have to stabilize them and do another D and C on these women to remove whatever infected material the abortionist had left in so that they would get better and I was on call every other night for six weeks and probably an average of 20 patients a night.

Q. Doctor, would it be fair to state that you participated in the performance of abortions from approximately 1971 through 1978?

A. Yes.

Q. Doctor, approximately how many abortions did you participate in?

A. Again, I didn't keep a strict count but several hundred, not more than 500 and not fewer than two hundred, I suppose.

Q. Doctor, are you familiar with the techniques and procedures used for abortion?

A. Yes, I am.

Q. Are these techniques and procedures common throughout the country?

A. They are standard in all residency training programs.

Q. Is the standard of care the same throughout the country then for the particular techniques and procedures of abortion?

A. Yes, it is.

MR. BATAILLON: Judge, at this time we would proffer Dr. Beverly McMillan as an expert with regard to the performance of abortions.

THE COURT: Ms. Chalker?

MS. CHALKER: City would again object that this is irrelevant and immaterial. I have no problem with this individual being deemed an expert in obstetrics and gynecology. I don't believe that she is qualified in testifying as to the standards or procedures used in Wichita or the medical community here in Wichita and I have to object on that basis.

THE COURT: I'll allow the testimony of Dr. McMillan as an expert in the area of the procedure called abortion.

MR. BATAILLON: Thank you, Your Honor.

Q. (By Mr. Bataillon) Dr. McMillan, could you please tell the Court the various types of procedures for abortions?

A. There are basically four types of abortion procedures performed in the United States.

The most common one, probably 90 percent of abortions, are done by the suction D and C method. Some are done by a standard D and C method. This is performed up to about 15, 15 weeks into a pregnancy.

I brought some visual aids if it would be appropriate at this time.

Q. Well, Doctor I want you to first explain to the judge —

A. Okay.

Q. — the four different types of procedures for abortion and if you could also please, advise the Court as to what period during the gestational age that these particular abortions are utilized techniques?

A. As I said, the majority, 90 percent or so of abortions are performed by some type of D and C procedure, usually a suction D and C.

This type of procedure, the abortionist will approach the uterus from below and this is a safe procedure to do up to about 15 weeks into the 40 week pregnancy.

When I first started doing abortions, great caution was used to stop at 12 weeks but with greater experience, people found that they could proceed on up to about 15 weeks in the pregnancy.

After 15 weeks, it's no longer safe to be putting instruments into the uterus from above for fear of perforating the uterus. The muscle wall of the uterus thins out drastically after about four months. So, some type of technique to enter the uterus from above is done.

There are several techniques for doing this. One is to induce labor. This would be done from about 16 weeks, up, even to full term.

Typically, amniocentesis type of abortion are done. In amniocentesis abortions, the abortionist will approach the uterus from the mother's abdomen.

A long needle is placed through her abdominal wall, through the muscle wall of the uterus and a sac of fluid around the baby. Some of the fluid is withdrawn and it is replaced by one of two chemicals, either prostaglandin or hypertonic, very concentrated salt solution, saline solution.

Both of them have a similar effect in causing the uterus to contract. The saline has the additional property of being very irritating not only to the muscle of the uterus, but to the skin of the baby. The baby gets, skin burns off swallows amniotic fluid and the salt and it causes a burning of the gastrointestinal tract.

There's a massive outpouring of serum from the burn site. The babies go into congestive heart failure for lack of blood volume, fluid volume and they usually die before the abortion is completed. Within several hours of injection of one of these chemicals, the uterus will start contracting. The woman goes into labor and she will deliver, usually, a dead baby.

Prostaglandin can also be used in second and third trimester abortions with suppositories, vaginal suppositories.

Prostaglandin is introduced as a suppository in the vagina, ingested into the mother's blood stream. That will cause contractions and labor.

Prostaglandin has to be used instead of the classic pitocin in the last three months of pregnancy because the uterus is unresponsive to the other in the last three months of preg-

nancy. It will cause labor and delivery of a premature, immature infant that usually does not survive.

When amniocentesis abortions fail or when prostaglandin abortions fail or in other particularly complicated circumstances a hysterotomy abortion can be performed.

A hysterotomy is a surgical, essentially a miniature cesarean section.

In this technique, the woman is prepared for surgery, anesthetized. An incision is made into the abdominal wall and then into the uterus.

The abortionist, usually, entering the bag of water in the uterus, will not deliver the baby immediately like you would in a normal cesarean section, but instead, reach in and separate the placenta from the wall of the uterus and or find the cord and clamp it and wait about five minutes.

During this time the baby is affixiated and then the baby is delivered stillborn.

If the baby is not stillborn, usual procedure would be to just put the baby in a steel surgical basin, cover it with a towel, leave it alone. It would not survive long without help.

Those are the four main ways abortions are performed in the United States.

Q. Doctor, you mentioned one type was the saline solution. Do they also refer to these babies as red apple babies?

A. Candied apple babies.

Q. Candied apple babies. Why do they refer to them as that?

A. When you look at one of these babies who has been aborted by saline, they look usually red compared to a baby that was aborted say by prostaglandin because the saline had burned the top layer of skin off the child and the blood vessels are, therefore, much closer to the surface of the skin and has a corresponding red, candied apple look.

Q. Doctor, does the abortionist, prior to the performance of the abortion, make a determination as to how old the child is inside the womb?

A. That's absolutely mandatory for doing a safe abortion, yes.

Q. And how does the abortionist go about doing that?

A. Well, there are three ways to determine length of gestational age. One is taking a history from the pregnant women. One of the questions that must be asked is the date of first day for last menstrual period.

By using wheels and calculations, we can determine how many weeks from first day of last menstrual period the pregnancy has progressed to.

The abortionist then needs to do a pelvic examination and examine the size of the uterus to see if this corresponds reasonably with the expected dates.

This is fraught with some clinical error at times. If the patient is unusually tense, her abdominal walls are tight, if she's overweight, frightened and uncooperative, this can be a little bit difficult to judge.

Nowadays, ultrasound sonograms are such a common office procedure, that this should be done, in my opinion, on every pregnant women before a termination to be sure that by measuring the biparietal of the baby's head and the femur and go to a table that correlates this information with gestational age, that the abortionist is certain as possible how far along this pregnancy is before proceeding with the termination.

Q. When the abortionist does the sonogram, are they able to see in the sonogram the outline of this baby?

A. Oh, yes, yes. We are able to see in a 12 week sonogram for instance, three month one, which would be the situation that I was most familiar with, you can get the picture of the

entire fetus on your screen. You can see the round head and the spine, femur length.

Q. Doctor, in the United States, during what period of time are abortions normally performed?

A. Most abortions are performed in the first three months of pregnancy, in the first 12 weeks. But probably 10 percent of them are performed after that in the second and third trimester.

Q. Can the abortion be performed up until the time of birth?

A. Yes, it can be, as long as the fetus, the baby, is inside the uterus. If the destruction procedure can be carried out such as abortion, it technically can be done.

Q. What is the earliest that abortion is performed by the technique or by the abortionist?

A. In an abortion clinic, free standing clinic such as the type I operated, we would normally not perform an abortion until the pregnancy had advanced to about seven to eight weeks. Trying to do an abortion before that time was fraught with some error. It's too easy to miss the small pregnancy inside the uterus prior to seven to eight weeks.

After seven, eight weeks, it's much easier to tell when the bag of water has been ruptured and you can make sure that you are interrupting the pregnancy.

Continued pregnancy after an attempted induced abortion certainly has been recognized in clinical studied and this is much more common in early pregnancies. So, normally seven to eight weeks.

Q. Doctor, what is the latest age of the, gestational age of the child that you have witnessed an abortion?

A. When I was a resident at Cincinnati, at Bathesda Hospital, I delivered a stillborn seven to eight month baby who was apparently killed by a saline abortion, although it was not

legal in Cincinnati at that time. We say that because of the condition of the baby, skin, when it was born and the fact that there were multiple needle marks on the baby's body as if from amniocentesis.

Q. How would amniocentesis leave needle marks on the body of the baby?

A. When the needle is introduced through the mother's abdominal wall into the uterus and the sac of fluid, it would be not uncommon to touch the baby, to stick the baby during that attempted procedure.

Q. Have you also been involved in any other late term abortions?

A. Once during my residency at Mayo, I assisted on a hysterotomy abortion that was probably six or seven months into the pregnancy.

Q. Can you tell the Court what happened in that abortion?

A. My recall is that we prepared the patient as for a normal cesarean section, made the appropriate incision into the abdomen and the uterus and to the best of my memory, the attending physician reached in and separated the placenta from the wall of the uterus. We waited a few minutes and delivered a stillborn infant.

Q. Doctor, have you brought some instruments with you today?

A. Yes, I have.

Q. And let me mark those first, please.

(At this time Defendant's Exhibits P through T were marked by the court reporter.)

Q. Dr. McMillan, I'm going to hand you what the court reporter has marked as Exhibits P through T. Do you recognize these instruments?

A. Yes, I do.

Q. Can you tell the Court, please, what those instruments are?

A. These are instruments that are normally used in a D and C procedure such as used in first trimester abortions.

Q. And could you describe for the Court what each of those instruments are used for, please?

A. Yes, and if you have that model, it will make it a little bit easier to understand.

(At this time Defendant's Exhibits U and V were marked by the court reporter.)

Q. (By Mr. Bataillon) Dr. McMillan, showing you what's been marked as Exhibit U and V by the court reporter, do you recognize that?

A. Yes, I do.

Q. Can you tell the Court, please, what those are?

A. These are some standard models of a pregnant uterus that are often used in teaching medical students. Just a visual aid in showing actual size of a pregnant uterus with a fetus inside. This one corresponds to about a three month or 12 week pregnancy. This one would correspond to a 16 week, four month pregnancy.

Q. And Doctor do those exhibits fairly and accurately depict the reproduction of the pregnancy and the child inside the womb?

A. Yes, they do.

(At this time Defendant's Exhibit W was marked by the court reporter.)

Q. (By Mr. Bataillon) I'm showing you what the court reporter has marked as Exhibit W. Do you recognize that?

A. Yes, this is a fetal model of a pregnancy at about 12 weeks of gestation.

Q. Does that model there fairly and accurately depict a child, unborn child in utero, at that age?

A. Yes, it does.

MR BATAILLON: Judge, at this time I would offer those exhibits which are P through W. We would ask the Court, we would like to take photographs of those to substitute the photographs for the actual exhibits.

Q. Dr. McMillan, would you demonstrate for the Court, please, the methods of the particular type of abortion?

A. Yes, I could.

Q. And what particular type of abortion would you be showing the Court?

A. I would like to use this model to show how a suction D and C, which is the most common procedure abortion, is accomplished, how a D and C abortion is done, and we could also show how an amniocentesis abortion is done on a pregnancy that is a little further along.

This model shows the pregnancy uterus, the fetus inside and the placenta attached to the wall of the uterus. This is the neck of cervix of the uterus.

In a suction D and C abortion, as I said, the abortionist will approach the uterus from below. He will visualize the cervix by putting a speculum in the vagina. Using a tenaculum, grasping instrument, he will hold onto the cervix to keep it steady. He then takes a long, thin, metal rod with notches on it that show inches, centimeters, places it through the cervix until it touches the top of the uterus.

By marking with his finger where the cervix is he can take it out and determine how large the uterus is.

This is another way in the procedure that he can determine how far along the pregnancy is.

The abortionist will then take a progressively larger metal rod dilator — that's what the D stand for in D and C.

Q. Doctor, I'm sorry to stop you, could you refer also to the exhibit number on those?

A. Yes, the tenaculum is Exhibit S. The sound is Exhibit R. The dilator is Exhibit P.

Q. And the model that you have in your hands, Doctor, what exhibit is that?

A. Exhibit number U.

Q. Okay.

A. This is a large dilator. They start out just a little but larger than that sound and they are placed into the cervix progressively until the cervix is opened up wide enough to accept a plastic suction cannula like this, exhibit T.

The suction cannula is in place through the cervix into the uterus. This end of the suction cannula is connected by a tubing into an electric pump.

The abortionist then turns the pump on by means as it were, as a vacuum cleaner, just vacuums out the contents, the amniotic fluids, the placenta of the uterus.

This is caught over in a little track stocking, track in the suction bottle.

When the abortionist feels the procedure is finished, that the uterus is clean, the good technique is to get up, take the suction bottle apart, take that stocking out and go to — I went to a sink — and check through the contents of that

stocking with a forceps to make sure that I had all of the parts.

I have to be able to identify a skull, a spine, four extremities, the thorax, and the placenta. If I did not find all of that, I would go back in the room, I suctioned, scraped some more until I then did find it so my patients would not be showing up 48, 72 hours later infected by an incomplete abortion as my experience in Cook County.

In a D and C abortion, the technique is fairly similar. The abortionist approaches the uterus from below, puts the tenaculum on the cervix, sounds the uterus to see how large it is, dilates the cervix to be sure that it can accept a curette, a metal curette — that's what the C stands for — a spoon-like, sharp knife.

The abortionist will put that in the uterus and scrape the placenta away, cut the baby's body up in small number of parts to come out through the cervix.

This is less commonly done, D and C, for two reasons: it takes longer and, two, it causes more bleeding than the suction procedure does. It is less commonly done. The metal curette is Exhibit Q.

Q. The metal curette, is it sharp on the ends of it

A. One edge is sharp.

Q. Concave?

A. Concave side is shard. The other is dull. You can tell when you have completed, emptied the uterus by a gritting sensation to the muscle walls, you've gotten down to the muscle.

In a saline type of abortion of any type of amniocentesis abortion, the abortionist approaches the uterus from the mother's abdominal wall. He preps off, he or she preps off the mother's abdomen with an antiseptic solution, a long

spinal needle is placed through the mother's abdominal wall into this sac of fluid around the baby.

Some of this is removed and replaced with some type of chemical which will cause the muscle wall to be irritated and go into labor and the labor pains themselves will dilate the cervix and labor will ensue and the uterus will expel a premature, immature baby.

Q. Will the baby normally be dead at that time?

A. Almost always.

Q. And why is that?

A. The contractions induced by saline or by prostaglandin are pretty vigorous, strong contractions. The skull bones of the baby are not fully calcified at 16, 18, 20 weeks of pregnancy and usually there's enough trauma to the baby's head and central nervous system that they die during the birthing process.

Q. Doctor, you've been using various time periods to describe the age or age of the child. Are these described, are those terms gestational age?

A. Those are gestational age from first day of last menstrual period.

Q. Is that different from fetal age?

A. Technically, yes, fetal age technically begins two weeks later at the time of fertilization, but usually it's more easy to identify gestational age because of the indicating of the last menstrual period.

Q. Doctor, all of the references you've made today, is that gestational age?

A. Yes.

Q. (By Mr. Bataillon) I'm handing you, Doctor, what the court reporter has marked Exhibits X, Y, Z, and AA. Do you recognize those?

A. Exhibit X is a photograph of a recently aborted baby; that's a hand. This is about 12 week gestational age fetus that has been aborted.

Exhibit Y is also an arm and hand of a first trimester abortion. This fetus has obviously been in some formalin because of the discoloration of the skin. Formalin is a solution that surgical specimens are placed in.

Exhibit Z is a picture of an upper thorax and arm and hand of a, I would say, 12 to 14 week gestational age fetus. Also this is like it's been preserved in formalin.

Exhibit AA has four pictures in it. The first picture at the top is labeled suction at eight weeks of pregnancy. It shows very much, very accurate description of a picture of what I would see at the abortion clinic sink. Shows placenta and small parts of a recently aborted baby.

The picture below it is the same picture of a recently aborted suction D and C, 12 weeks, and I can say that this looks very accurate too. 12 weeks you can very easily recognize the arms and legs and ribs.

The back pictures show a baby that was killed at four months by prostaglandin with the normal looking skin, recent abortion because there's no deterioration of the body. And below that is another form of abortion, a saline abortion. I can tell it's saline because of the extremities discoloration and burning of the skin on this.

Q. Doctor, do these photographs, pictures, fairly and accurately depict babies that have been aborted at those particular ages?

A. Yes, they do.

Q. How do you know that?

A. I know that because I've seen this with my own eyes before. I also know it by medical education and reading my literature.

Q. Doctor, you mention the D and C abortion. Do you also have to piece the parts together of a child at the conclusion of the D and C abortion?

A. Yes.

Q. And what's the reason for that?

A. Again to be sure that the baby has been removed in its entirety, the placenta in its entirety. One of the known complications from suctioned or D and C abortions is retained parts which cause infection and bleeding, basically the picture that I would see on the Infected O.B. Ward at Cook County Hospital.

Q. Doctor, what is the effect of the abortion upon the child inside the mother's womb?

A. Well, it kills the child inside the mother's womb.

Q. Doctor, is this procedure, abortion, painful upon that child inside the mother's womb.

A. My medical reading has included different medical experiments on babies in utero at early gestational age, as early as 11 weeks. Studies have shown babies will move back from an amniocentesis needle, they feel it.

They also, by injecting sweet solution into the amniotic sac, have watched babies at 11 weeks swallow rapidly. If they put something sour into the amniotic sac, they quit swallowing.

They are able to hear at 11 weeks. One experiment, a baby was touched with a needle several times, then a buzzer

sounded prior to touching the child with a needle. After three or four times, all the experimenter had to do was sound the buzzer and the baby had jumped. It had learned that the needle was coming. This was 11 weeks into pregnancy.

It's the same as learning mechanism of a full term 40 week baby. It's already present at 11 week gestational, central nervous system is well-developed at 11 weeks and painful perception has been documented in the literature.

Q. Doctor, do some babies that have the abortion performed upon them, for example, the saline solution or the prostaglandin abortion, do any of these babies ever come outside the womb alive?

A. Yes, some of them do.

Q. And what occurs to these babies?

A. Different things are done. Some babies obviously survive and have been aided by the health community such as that child that was aborted in New York City, the arm removed.

Many times, however, these babies are placed in the surgical steel basin, covered up with a towel and just left alone. Several hours later someone comes and looks and determines that they have died.

Q. When you were performing the abortion, Doctor, what was the goal that you were trying to achieve when you performed the abortion?

A. A dead baby and an empty uterus and a safe trip home for mom.

Q. Doctor, in your medical profession, are you familiar with any of the complications, physical complications of abortions upon these mothers that have had abortions?

A. Yes, I am.

Q. Could you tell the Court what those are?

A. There are three main physical problems with abortion procedures. Bleeding, infection, damage to the uterus or to other adjacent organs such as the bladder, the bowel.

Q. Have you treated any of these problems?

A. Oh, yes. When I ran my abortion clinic, Family Health Services, our most common complication was probably a low grade infection, endometritis. Probably 10 percent of our procedures, we would get callbacks with questions about this. Nothing usually of a real serious manner, unless they were neglected and had parts left in to really be a nidus of infection.

So infection, hemorrhage, just uncontrollable bleeding or more bleeding than average in the abortion.

Usually the serious bleeding complications occurred as a result of the physician getting into a pregnancy that was farther along than anticipated. Thinking that you were operating on a 12 week pregnancy; instead you were operating on a 16th week pregnancy and bleeding also occurs if one of these instruments are inadvertently used to perforate through the muscle wall of the uterus and damage the uterine artery or vein. You can get into some very serious bleeding from that.

Q. Do you have any other ones, Doctor?

A. Any other complications?

Q. Complications?

A. Yes, perforated uterus, specifically with a suction curette and going ahead and suctioning, not being aware this is happening, can cause damage to abdominal organs.

I had one complication — this is serious of that nature occurs one in 500 first trimester abortion — I had one occur in my experience to where part of the small bowel is damaged and the woman had to undergo emergency

laparotomy and repair and reanastomosis of her bowel from this.

Q. Are any of these complications long term or long lasting?

A. Yes, some of them can be really long term and long lasting. I think of two.

One is damage to the cervix, the mouth of the uterus. The trauma of quickly dilating the cervix can cause tearing and damage of to the cervix so that it's weakened and in subsequent pregnancies, there is a chance that the cervix will give way and the woman will deliver prematurely at five or six months rather than being able to hold that pregnancy in for the full nine months.

Incompetent cervix from damage from abortion, that can occur. If some hemorrhage is caused by perforating through the uterus and damaging the uterine artery, it sometimes necessitates surgical removal of the uterus, hysterectomy and the long time complication of that will be sterility.

Q. Can death be a result of an abortion?

A. Yes.

Q. How does that occur?

A. Death by abortion occurs either by an infection that has come fulminant and caused septicemia, infection in the blood stream and just unable to stop the process.

It can be caused exsanguination by bleeding to death.

Anesthetic complications, either an anesthesia used during the abortion procedure itself or during surgery to try to remedy damage to the uterus.

Q. Doctor, do you have an opinion, based upon your medical knowledge and your experience, as to when human life begins? What is that opinion?

A. My medical opinion, based on my medical training, on my education, is that life begins, human life begins at conception.

Q. Does human life continue throughout the entire development of the pregnancy of that child in utero?

A. Yes, it does. Otherwise, we would not have to kill this baby by abortion.

Q. Doctor, the opinions that you have given today, are those opinions based upon a reasonable degree of medical certainty?

A. Yes, they are.

Q. Doctor, why initially were you performing abortions?

A. I was initially performing abortions because I was somewhat of a feminist in the early 70's and I thought reproductive freedom included abortion access. I did not like what I saw in Cook County Hospital either. I did not like the fact that women were having inadequately-performed abortions, nor the disrespect that these patients were treated with by the medical personnel when they would come in with this complication.

Q. Doctor, why did you quit doing abortions?

A. I guess I quit because I was tired of trying to be a good abortionist. Part of the technique of being sure that a complete and safe job had been done was examining the contents of that suction stocking and I guess standing at that sink day after day picking through the arms and legs and skulls and such, I just finally opted where I; I didn't like it, I realized, I came to some realization that these were human baby arms and legs.

Q. Doctor, do you feel you made the right decision?

A. Absolutely.

CROSS-EXAMINATION

BY MS. CHALKER:

Q. Have you previously testified in cases regarding the necessity defense or justification defense?

A. Yes, I have.

Q. Do you have any estimate how many cases you've testified in?

A. For the necessity defense?

Q. Or justification defense.

A. Two, to my knowledge.

Q. Were those both for defendants?

A. Yes.

Q. Likewise, you don't know whether all four types of abortion procedures are utilized by the Family Planning Clinic, is that a fair statement?

A. That is correct.

Q. And you don't know how early abortions are performed at that clinic, is that also correct?

A. When they begin doing them?

Q. Yes.

A. No, I don't.

Q. Or what procedures are used to determine the age or the amount of gestation of the babies, is that also correct?

A. I know what they should be doing. I don't know what they do.

Q. You don't know whether saline abortions are even performed at that clinic?

A. I do not.

MS. CHALKER: That's all I have.

REDIRECT EXAMINATION

BY MR. BATAILLON:

Q. Dr. McMillan, with regard to the questioning regarding the type of procedures used to determine the gestational age of the child and also the type of procedure used for the abortion at this particular clinic, if you knew what the gestational age of the child is, would you be pretty familiar with what type of technique they are normally using for those types of abortions?

A. Yes, I would.

Q. Are those techniques standard throughout the country?

A. Yes, they are.

Q. Doctor, you testified on cross-examination that you have participated in two other trials with regard to the necessity or justification defense. Do you know what the outcome of those verdicts were?

A. Yes.

Q. What were they, please?

A. One was found for the defendants; one was found against them.

Q. Thank you very much.

Closing Arguments

BY MR. GRABER:

At the outset of this matter, Your Honor, we came to this Court and asked for an opportunity to present evidence on two basic issues.

In the first instance is the issue of when we have life and the reason we ask the Court for that opportunity is because we're not here in contradiction or in any reference to decisions made in *Roe vs. Wade*. *Roe vs. Wade* is void on this issue. And I quote from the court, page 730 of the decision, "We need not resolve the difficult question of when life begins. When those training in the respective disciplines of medicine, philosophy and theology are unable to arrive at a consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer, end quote.

It is this void in the *Roe vs. Wade* decision that has generated much of the controversy, political schism, and indeed the enduring problems in corpus juris that we are asked to live with today.

We asked the Court for the privilege of bringing this evidence and we promised we would do our very best to bring the best evidence to the Court.

First of all, we would submit, your Honor, that when life begins is not a philosophical question. Philosophy deals with the issue of who am I, what is my view of the world, how do I find my place in the world. It merges and runs into the discipline of theology at some points.

> The Supreme Court itself has differentiated these two notions. In many of the cases it has decided on religious issues, it says philosophy is not tantamount to religion. Religion is a higher course, presupposing Supreme being in place of some thing or object. Philosophy in the traditional notion of a Supreme

being and simple moral philosophy or philosophy of life does not satisfy that context.

We are not here talking about and beg to differ that this is a philosophical or theological debate. If that were the case, we could begin with Plato, Aristotle and run into the ends of time and never arrive at any consensus.

Moreover, to say that this issue is beyond the biological or the notions of biological science is to beg the question. It was probably true when the Court said, at this development of man's knowledge, we may not be able to say conclusively that we have seen life begin.

It must be remembered that the case *Roe vs. Wade* was a declaratory action for injunctive relief. There was no record. There was not a film presented by a Dr. Hilgers in which a court was allowed to view not only conception, but the very physiological, medical, biological precursors to conception.

There was not a Dr. Lejeune, who could testify regarding D.N.A. and the uniqueness, the individuality, the irreplaceable nature of the human being from conception, a living sperm joining with a living egg to form a living zygote that could be nothing but a living human, living zygote. It could not be an elephant, as we saw in the pictures.

We did not have the advantage of a world class authority on the trauma that results in the life decision made unwittingly, uninformed and perhaps even under a coerced or a forced environment.

We did not have the testimony that shows that not only does the mother suffer psychologically when this harm occurs, but the father, the partners, siblings and grandparents.

We did not have, the court in *Roe vs. Wade*, did not have a Dr. McMillan on the record relating the political, the professional honesty going from a position in being an abortion

provider to someone who realizes that abortion is indeed the killing, the taking of a human life.

And then the Court would have been correct in saying that this was not available to them for they had no record.

But we don't have to go to the point of asking the question, is the necessity defense the appropriate lesser of the evils, justification.

As the Court well knows, stating for the record again, during the pretrial conference we argued to the judge that there would be no need in talking about the necessity, there would be no need to raise this defense and take the Court's time if we first do not address the void that is left to us in the *Roe* decision and that void is the resolution of the difficult question of when life begins.

And I hope that we have provided to the Court the evidence that we promised on the resolution of that issue. Because Ann Tilson was not at the abortion clinic protesting abortion. She was not at the clinic to provide information to mothers. She was at the clinic to provide an opportunity for the rescuing of the life of babies in the womb and to prevent the harm to mothers that this Court has heard in some graphic detail not just might exist, but the very real potential would exist unless there was stoppage there.

She doesn't have to be exactly right in that, according to the law. She just had to be reasonable and as she related to the Court, she's been involved in this six years. She's read the literature, followed the progression of when life begins and she's explained to the Court documents that we've asked the Court to consider. Considering those articles, Life Magazine, to the body politic, certainly there must be some reasonableness in their presentation.

The real problem that is generated by the void left in the *Roe* decision is the court presupposed or reimposed the issue of liberty over life.

How can there possibly be liberty unless we have life?

The Constitution was not written for inanimate objects. It was not written for dogs and cats. It was written for people, for human beings and it begs the issue to say that we do not have to decide the issue when life begins.

The 14th Amendment reads life, liberty and the pursuit of happiness.

To leave life out of that equation and to assert liberty over life is an inverse relationship. That has caused this schism of which we have today and what we are asking the Court to do is not to determine personhood, that's not necessary, but to determine life, this was a life.

If someone chose to call it an embryo or potential life, so be it. The reality, there was a life here that every witness testified to and Dr. Lejeune with specificity. This life is irreplaceable, it will happen one time, it will never happen again, five billion people in the Planet Earth and there are five billion D.N.A. codes. All of the information goes into us, making us who we are, mind, body and spirit and that is irreplaceable and it's a serious thing, indeed, we would submit to the Court, that 27 million of those irreplaceable human beings have been removed from our civilization without an opportunity for them to have any input into that decision, simply because we have not legally determined whether or not they are life.

It is inappropriate to compare this activity to the activity of protesting a nuclear plant.

The World Congress in Nuclear Fission has already stated over and over again, Chernobyl will never happen in America and we're certainly not talking about a meltdown. Even if we were, Chernobyl did not kill 26 million people. It is inap-

propriate to even categorize Mrs. Tilson's acts as civil disobedience. Civil disobedience presupposes a violation of the law that is irremedial.

What is Mrs. Tilson's position? It is that she was justified, Your Honor. She was justified because there were lives who could not speak for themselves being terminated. These were human lives and they had been from conception.

The scientific evidence produced to the Court and the direct declarations of both Dr. Lejeune and Dr. Rue indicate that it was not only reasonable but very reasonable; and it was very reasonable for Mrs. Tilson to take a position that she was preventing harm to the mothers that they might unwittingly be perpetrating on themselves.

In 1989 there might be certain scientific evidence of when life begins and that statute probably should be reviewed, but your Honor, we're not asking the Court to establish a crime here and for those reasons *Trudell* and *Green* cases are inapplicable. Those cases deal with the issue when the legislature has defined a crime. They deal with the issue of when a human being is a human being for purposes of criminal liability.

As we all know, the Supreme Court has ruled over and over again, one cannot be called for criminal account unless there is a statute which clearly puts that one on notice that they have; in fact, committed a crime and that was the issue. Yes, that is a legislative function, to define crimes of the state.

We're not asking for criminal definition of the state criminal code. What we're asking is that we define life.

The same Supreme Court of the same case, *Green* case, declined to do that. So, not only has the Supreme Court of the United States declined to do that, but the Supreme Court of Kansas has also entered into that notion.

We're not asking the Court to overrule *Roe vs. Wade*. That's important to understand. I say it again; there's a void

here that has created many incongruities in the corpus juris of America.

These are in our belief. Just as a mention to highlight, we have law, depending on whether it's a state law or tort law, granting to babies in the womb, rights and, yet, if a mother decides to terminate that life before it is born, those rights are snuffed out and we pretend that that is legal, that is rational, that that makes sense.

The conflict that rages across the corpus juris, not just from the subject but from state to state. Some states have taken a tremendous whack at rational thinking.

For example, in the State of Texas, their criminal code defines homicide as intentional killing of an individual. Then definitionally, they define an individual as a human being who's been birthed.

Of course, that convoluted the definition to the point it's almost like the proverbial scrambled egg, unresolvable.

All of this, we submit to the Court, failure to define when life begins and to define that life as what it is, the life of a human being, life, liberty and the pursuit of happiness cannot be quantified but must be defined. If we don't have definition in the criminal law, then it's inappropriate to define crime.

But the Supreme Court of Kansas long ago decided that it was going to define personhood under constitutionality.

This case was also decided — this is a constitutional question. It is inconsistent jurisprudence to say that we extend the concept of life, liberty and the pursuit of happiness to individuals depending in status of their existence on the continuums we've heard discussed today and finally it's the very fundamental notion of equal protection under the law.

What is the rational basis given the evidence that we've heard today and granted that the *Roe* court never did hear

evidence for saying that a life one minute postpartum is more protectable than one minute before birth. What is the rational decision for saying that a child conceived, that has all of the D.N.A. information to be all that it's ever going to be short of some artificial interruption of that process, what is the rational basis for extending to that human being less protection than one who's one minute born?

I appreciate the new bill that the State of Kansas has passed. I — by the work appreciate I mean concerned. The point is one has to wonder why that new legislation came into being if there was not concern that the defense of necessity and justification might be viable.

In summary, Your Honor, I think we've said what we need to say in our extensive brief.

I apologize to the Court for the editorial means of that particular document.

But, we do not here have a violent woman who acted in an emotional outrage and committed damage to property.

We have here a woman who, after six years of study, living with the outrageous inconsistencies that transcend our legal and political system for want of definition of life, took an intelligent, rational step to make a statement, not in civil disobedience, not civil disobedience, it is justified under the common law, to go on real property in a nonviolent, non-damaging fashion to save life.

I dare say none would suggest that if you knew a bridge is out and could catty-corner across a piece of property to stop a car from plunging into the bridge and intentionally terminating the lives of the owner, one would argue that that trespass was a civil disobedience and that's what we have here, much greater surely, much more risk, much more at stake.

We would ask the Court to return a not guilty finding on behalf of Mrs. Tilson.

Supreme Court, U.S.
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No. 93-467

In The

Supreme Court of the United States

October Term, 1993

ELIZABETH A. TILSON,

Petitioner,

v.

CITY OF WICHITA, KANSAS
MUNICIPAL CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Kansas

BRIEF IN OPPOSITION

*GARY E. REBENSTORF
City Attorney
Office of the City Attorney
City of Wichita, Kansas
City Hall – 13th Floor
455 N. Main
Wichita, Kansas 67202
(316) 268-4681

*Counsel of Record

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Whether, in light of modern medical science, the factual foundations of *Roe v. Wade* are sufficiently changed so as to require a reanalysis of the abortion right; specifically, whether the Court must consider whether or not it is now necessary to determine when life begins.

2. Whether it is still correct analysis, under the *Roe* abortion right, to consider the reproductive right and liberty right as superior to the life issue.

3. Whether since viability, as now determined by medical science exists from conception, the viability standard must be established at conception.

4. Whether the Kansas Supreme Court erred in holding petitioner's medical scientific evidence irrelevant.

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, Respondent states that the only interested persons in this proceeding are those persons listed as parties to these proceedings, their attorneys, and the entities identified by the Petitioner in its Rule 29.1 Statement in its Petition for Writ of Certiorari.

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No. 93-467

In The

Supreme Court of the United States

October Term, 1993

ELIZABETH A. TILSON,

Petitioner,

v.

CITY OF WICHITA, KANSAS
MUNICIPAL CORPORATIONS,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Kansas

BRIEF IN OPPOSITION

The Respondent, City of Wichita, Kansas, respectfully requests that this court deny the Petition for Writ of Certiorari, seeking review of The Kansas Supreme Court's opinion in this case.

STATEMENT OF THE CASE

This Petition for Writ of Certiorari follows the successful appeal of Respondent, the City of Wichita, from the District Court's ruling that the necessity or choice of evils defense absolved the defendant of criminal liability for her actions in trespassing at an abortion clinic. The

State District Court Judge, the Honorable Paul Clark, held that the harm caused by a legal abortion was greater than the harm caused by the defendant's illegal actions in trespassing on the clinic property, and therefore she was absolved of criminal liability for her actions.

The City's appeal was only on a question of state law and raised two legal issues of the District Court's ruling to the Kansas Supreme Court: (1) Was the necessity defense recognized by Kansas Law at the time of the defendant's arrest? and (2) Was the defense applicable to the defendant's acts of public protest?

The Kansas Supreme Court held that if recognized as a defense in a criminal case, the necessity defense only applied when the harm or evil, which the defendant sought to prevent by his or her own criminal conduct, was a legal harm or evil as opposed to the moral or ethical belief of the individual defendant. Because the harm sought to be prevented (i.e. abortion) was a legal and constitutionally protected act, the necessity defense did not apply and the defendant's evidence of when life begins was irrelevant and should not have been admitted by the trial court.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. SUMMARY OF ARGUMENT

Petitioner's Writ for Certiorari should be denied in this case for the following reasons: (1) Neither the Court below nor the record raises the questions presented in the

petition; (2) the United States Supreme Court lacks jurisdiction to review the issues presented; and (3) the Kansas Supreme Court's opinion is consistent with the decisions of the United States Supreme Court and other state courts and there is no compelling reason for the Court to intervene in this case.

The Kansas Supreme Court, in its opinion states that the only issue before it was simply "whether the necessity defense, if it were recognized, even applied at all in a case such as this one." The defendant, in her petition has misstated the issues presented and decided by the Kansas Supreme Court. Because the issues were not raised or determined below, consideration of these issues by this Court is not required.

Secondly, the United States Supreme Court lacks jurisdiction to determine the issues presented. The issues determined below involved only the interpretation of Kansas Criminal Law. Because there were no substantive federal questions raised or determined by the lower court, Petitioner's Writ for Certiorari must be denied.

Lastly, the lower court's ruling comports with the United States Supreme Court's rulings regarding the legality of and the constitutional protections afforded to abortions. The decision also is consistent with the numerous jurisdictions which have addressed the issue of whether the necessity defense applies to acts of public protest. There is no compelling reason, in the context of this case, for the Court to grant Certiorari.

II. NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE QUESTIONS PRESENTED IN THE PETITION.

Petitioner, in her Petition for Writ, asserts that there are four issues which are properly before this Court. These assertions not only misconstrue the opinion of The Kansas Supreme Court, but misstate the issues which were appealed by the City of Wichita to the Kansas Supreme Court.

For purposes of determining questions of state law, the City appealed two legal issues to The Kansas Supreme Court: (1) Was the necessity defense recognized by Kansas Law; and (2) Did the defense apply to acts of public protest? As the Kansas Supreme Court noted in its opinion, the only issue properly before it was that if the defense was recognized, did the defense apply to the facts before the court. *City of Wichita v. Tilson*, 253 Kan. 285, 855 P.2d 911 (1993).

The Kansas Supreme Court, in reversing the trial court, expressly held that the determination of the issue of when life began did not need to be decided: Where the objective sought to be prevented was a lawful, constitutional right, the common law defense of necessity was inapplicable and any such evidence as to when life began was irrelevant. *City of Wichita v. Tilson*, 253 Kan. 285, 855 P.2d 911 (1993).

In determining if petitioner's Writ should be granted, this Court must inquire as to whether the federal question was presented to the state court in such a manner that it was necessarily decided by the state court. When

the highest state court fails to pass upon a federal question, it is assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party can affirmatively show otherwise. *Street v. New York*, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572, 579 (1969), *Webb v. Webb*, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 392, 396 (1981) and *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 2321, 76 L.Ed.2d 527 (1983) (Court has no jurisdiction unless a federal question had both been raised and decided in the State Court below. If both of these requirements do not appear on the record, the appellate jurisdiction fails.)

In this case, there were no issues of federal law presented to or decided by the Kansas Supreme Court. The issues presented were questions of state law only. Because the federal issues cited by petitioner were not presented below, petitioner's Writ for Certiorari should be denied.

III. THE COURT LACKS JURISDICTION TO REVIEW THE ISSUES PRESENTED.

The petitioner asserts that jurisdiction is proper pursuant to 28 U.S.C. § 1257, (Rule 10.1(c) of *The Rules of The United States Supreme Court*). This section provides jurisdiction to this Court when: "[a] State Court or a United States Court of Appeals has decided an important question of federal law which has not been, but should be settled by this court, or has decided a federal question in a way that conflicts with applicable decisions of this court." (Rule 10.1(c) of *The Rules of the United States Supreme Court*). Because the Petitioner cannot establish

either of these criteria, the United States Supreme Court lacks jurisdiction to hear the appeal.

The Kansas Supreme Court's holding that the necessity defense does not apply to prevent a lawful constitutional right (i.e. abortion) did not conflict with the United States Supreme Court's opinions regarding the status and constitutional protections afforded to abortions. *See Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed. 2d 147 (1973) and *Planned Parenthood of Southeastern Penn. v. Casey*, ___ U.S. ___, 112 S.Ct. 2791, 120 L.Ed. 2d 674 (1992).

Petitioner asserts that because of the scientific evidence presented, that the United States Supreme Court's decision in *Roe* must be re-examined and therefore the court has jurisdiction. Petitioner ignores the fact that no federal question was determined by the Kansas Supreme Court to grant jurisdiction to the United States Supreme Court, and the Kansas Supreme Court expressly held that such medical evidence was irrelevant.

The issue before the United States Supreme Court pertains to the applicability of a state law defense to the defendant's actions. "Crimes in the U.S. are what the laws of the individual states make them, subject to the limitations of Art. I, Sec. 10, Cl. 1 and the Thirteenth and Fourteenth Amendments." *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952).

The issue decided by the Kansas Supreme Court did not resolve any issue of federal or constitutional law. As framed by the petitioner, the issues presented to the United States Supreme Court do not involve any issues of federal or constitutional law. Because the lower court made no decisions regarding substantive federal law, the

United States Supreme Court lacks jurisdiction to hear the appeal and petitioner's Writ for Certiorari should be denied.

IV. THE DECISION OF THE KANSAS SUPREME COURT IS CONSISTENT WITH THE OPINIONS OF THE UNITED STATES SUPREME COURT, AND OTHER STATE COURTS WHICH HAVE ADDRESSED THIS ISSUE. THERE IS NO REASON FOR THE COURT TO GRANT CERTIORARI.

As stated previously, the opinion of the Kansas Supreme Court is consistent with the United States Supreme Court's opinions regarding abortion and the constitutional protections afforded to abortions. *See Roe v. Wade, supra* and *Casey, supra.*

Further, the opinion of the Kansas Supreme Court is consistent with the overwhelming majority of states that have addressed this issue. *See* Annotation, *Choice of Evils, Necessity, Duress, or Similar Defense to State or Local, Criminal Charges Based on Acts of Public Protests,* 3 A.L.R. 5th 521 (1992). Lastly, the United States Supreme Court has consistently refused to grant Certiorari in other cases pertaining the precise issue determined by the Kansas Supreme Court. *See State v. Anthony,* 588 A. 2d. 214 (Conn. App. 1991) *cert. denied* ___ U.S. ___, 112 S.Ct. 312, 116 L.Ed.2d. 254 (1991) (refusal to consider abortion protester's necessity defense for simple trespass was not an abuse of discretion as the harm sought to be prevented by the defendant was not recognized as an injury under the law); *State v. Migliorino,* 442 N.W.2d 36 (Wisc. 1988) *cert. denied* 493 U.S. 1004, 110 S.Ct. 565, 107 L.Ed.2d 560 (1988) (necessity defense not applicable to acts of protest at

abortion clinics); *Commonwealth v. Markum*, 541 A.2d 347 (Pa.Super. 1988) *cert. denied*, 489 U.S. 1080, 109 S.Ct. 1533, 103 L.Ed. 2d 837 (1989); *Crabb v. State*, 754 S.W.2d 742 (Tex. App. Houston 1988) *cert. denied* 493 U.S. 815, 110 S.Ct. 65, 107 L.Ed.2d 32 (1989) (statutory defense of necessity did not apply to protests at abortion facilities); *Bobo v. State*, 757 S.W.2d 58 (Tex. App. Houston 1988) *cert. denied* 490 U.S. 1066, 109 S.Ct. 2066, 104 L.Ed.2d 631 (1989) (no error in trial court's refusal to allow introduction of evidence on the necessity defense); *Erlandson v. State*, 763 S.W.2d 845 (Tex. App. Houston 1988) *cert. denied* 493 U.S. 852, 110 S.Ct. 152, 107 L.Ed.2d 110 (1989) (necessity defense not applicable to protesters at abortion clinic); *Reed v. State*, 794 S.W.2d 806 (Tex. App. Houston 1990) *cert. denied* ___ U.S. ___, 111 S.Ct. 2018, 114 L.Ed.2d 104 (1991) (evidence regarding the defense of necessity was irrelevant in context of protests at abortion clinics); *Chunn v. State*, 821 S.W.2d 718 (Tex. App. Houston 1991) *cert. denied* ___ U.S. ___, 113 S.Ct. 203, 121 L.Ed.2d 144 (1992) (no error in trial court failing to instruct on necessity defense); *Zarsky v. State*, 827 S.W.2d 408 (Tex. App. Corpus Christi (1992)) *cert. denied* ___ U.S. ___, 113 S.Ct. 1586, 123 L.Ed.2d 152 (1993) (antiabortion protester being prosecuted for tresspass was not entitled to raise defense of necessity); *Boushey v. State* 804 S.W.2d 148 (Tex. App. Corpus Christi 1990) *cert. denied* ___ U.S. ___, 112 S.Ct. 311, 116 L.Ed.2d 253 (1991) (no error in refusing to admit evidence as to when life begins).

There are no distinguishing factors in the case at bar from those cited above which would require the Court to

grant Certiorari. There are no issues of federal or constitutional law to be determined. Consequently, petitioner's Writ of Certiorari should be denied.

CONCLUSION

For the reasons stated above, the City of Wichita respectfully requests that the Court deny the Petition for Writ of Certiorari to the Kansas Supreme Court.

Respectfully submitted,

GARY E. REBENSTORF
City Attorney
Office of the City Attorney
City of Wichita
City Hall-13th Floor
455 N. Main
Wichita, Kansas 67202
(316) 268-4681

Counsel for Respondent